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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

BP CHEMICALS (HITCO) INC.,
Petitioner,
v.
ROBERT and JANET GAYLORD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

STEPHEN C. KENNEY
TOM K. HAMMITT
KENNEY, BURD & MARKOWITZ
Two Embarcadero Center,
Suite 740
San Francisco, California 94111
Telephone: (415) 397-3100
Counsel for Petitioner
BP CHEMICALS (HITCO) INC.

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

38 pp

QUESTION PRESENTED

Whether the federal common-law government contractor defense preempts state law tort claims for liability for alleged design defects in military equipment, regardless of whether such claims are denominated under state law as "design defect" or "failure to warn" claims, in injury or death actions against suppliers of asbestos-containing materials that were mandatory for use, under the government contracts involved, in the construction of strategic guided missile propulsion systems from the 1950s through the 1970s.

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PARTIES TO THE PROCEEDINGS BELOW

Petitioner and defendant below is BP Chemicals (HITCO) Inc. ("BP Chemicals"), a California corporation. Respondents and plaintiffs below are Robert Gaylord and his wife, Janet Gaylord.

OPINIONS AND ORDERS BELOW

The unpublished memorandum opinion of the California Court of Appeal, First District, affirming the plaintiffs' judgment below, dated July 12, 1994, is reproduced in Petitioner's Appendix at Tab 20. The unpublished order of the California Supreme Court denying BP Chemicals' petition for review, dated October 13, 1994, is reproduced in Petitioner's Appendix at Tab 27. Final judgment was entered by the Superior Court for the State of California, City and County of San Francisco, on December 14, 1994.

JURISDICTION

This Court has jurisdiction to review the judgment by a writ of certiorari pursuant to 28 U.S.C. § 1257(a) (1988). The order of the California Supreme Court denying BP Chemicals' petition for review was entered on October 13, 1994. This petition is timely pursuant to 28 U.S.C. § 2101(c) (1988) and Sup. Ct. R. 13.1.

CONSTITUTIONAL AND FEDERAL COMMON LAW PROVISIONS

The Supremacy Clause, Article VI, Clause 2 of the United States Constitution, is reproduced in Petitioner's Appendix at Tab 1. This Court's decision establishing the federal common law government contractor defense, *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), is reproduced in Petitioner's Appendix at Tab 2.

STATEMENT OF THE CASE

This personal injury action, captioned *Robert Gaylord and Janet Gaylord v. BP Chemicals (HITCO) Inc.*, No. 891562 in the Superior Court for the State of California, City and County of San Francisco, arose from lung cancer suffered by Robert Gaylord. The plaintiffs, respondents herein, alleged that Mr. Gaylord's cancer was caused by the combined effect of his cigarette smoking and alleged occupational exposures to asbestos at Kaiser Aerospace ("Kaiser") in San Leandro, California, where he worked from 1956 until 1987. With respect to BP Chemicals, the plaintiffs alleged that Mr. Gaylord was exposed to asbestos contained in materials supplied by its predecessor U.S. Polymeric, which were used in fabricating certain parts for the rocket motor systems for the strategic guided missile programs in which Kaiser was involved.

A. *Factual Background*

1. *U.S. Polymeric*

From the 1950s through the present, U.S. Polymeric has designed and manufactured resin-impregnated ablative "tapewrap" that was required for use in the construction of the rocket motors for various strategic guided missile systems under contracts with the United States government or with government prime contractors. The tapewrap consists of fabric woven from any of several temperature-resistant industrial fibers, such as carbon, graphite or silica, impregnated with phenolic resin. (Appellant BP Chemicals' Opening Brief ("A.B.") (copy reproduced in Petitioner's Appendix at Tab 17), p. 4.) The tapewrap is used to fabricate ablative liners to protect the underlying rocket motor structures from heat during firing.[1] *Id.*

Until approximately the mid-1970s, U.S. Polymeric manufactured limited amounts of tapewrap using chrysotile, a form of asbestos. (A.B., p. 4). U.S. Polymeric's asbestos-containing

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[1] "Ablation," as pertinent to this action, is the process by which certain materials combine with, and are eroded by, the hot gases associated with thrust generation or high-speed atmospheric flight. *Id.*

tapewraps included materials designated as "FM 5075" and "FM 5076." *Id.* After learning of the potential hazards of asbestos exposure in the mid-1970s, at approximately the same time as other aerospace-industry suppliers of asbestos-containing products, U.S. Polymeric began including asbestos health hazard warnings with the boxes in which FM 5075 and FM 5076 were delivered. *Id.*, p. 5. At about the same time, U.S. Polymeric notified the industry that it would no longer manufacture asbestos-containing tapewrap, except in support of existing government contracts where continued production was required. *Id.*

One of the contractors to whom U.S. Polymeric supplied FM 5075 and FM 5076, as well as other ablative tapewraps that did not contain asbestos, was Kaiser Aerospace ("Kaiser") in San Leandro, California. U.S. Polymeric supplied approximately 35 orders of FM 5075 and FM 5076 to Kaiser, which comprised less than three percent of U.S. Polymeric's total supply of ablative tapewrap to Kaiser from the 1950s through the mid-1970s. (A.B., p. 25). Kaiser also purchased substantial quantities of asbestos-containing materials from other suppliers in support of government missile programs. *Id.*, p. 7.

At Kaiser, FM 5075 and FM 5076 were required for use in the fabrication of ablative liners for the rocket motors of the second-stage Polaris A3 and Poseidon missile systems. (A.B., p. 4). The liners were made by wrapping the tapewrap around appropriately shaped mandrels, curing the parts in autoclave ovens, and then lathing them to final dimensions. The lathing process generated dust, for which Kaiser installed various dust removal systems over the years.

The use of FM 5075 and FM 5076 in these missile programs was required under Kaiser's contracts with the government or with prime contractors. (A.B., p. 4). These contracts restricted Kaiser to using only the suppliers and products that were specified on the "qualified products list" (QPL) for the particular missile part involved. (A.B., pp. 26-27).

QPLs were created as an integral part of the missile design process, in which materials suppliers such as U.S. Polymeric would consult with government contractors and government offi-

cials, and would investigate whether improved materials could be developed for a new missile program, or if materials developed for previous missile programs should be used. (A.B., pp. 26-27). Materials under consideration were rigorously tested; qualification of an ablative tapewrap on a missile program, for example, typically involved at least 120 rocket motor test firings. *Id.*, p. 27.

Once the design of the missile system, including the associated QPLs, was reviewed and finally approved by the military, U.S. Polymeric, like other suppliers of qualified products, was prohibited from altering the products in any way, including changes in the raw materials used or the processes through which qualified products were made. (A.B., p. 27). Suppliers were also required to continue providing the qualified products throughout the life of a missile program, when theirs was the only product approved for use in a given application. *Id.*

2. *Robert and Janet Gaylord*

Plaintiffs Robert and Janet Gaylord are husband and wife. Robert Gaylord, age 59 at the time of the trial, suffers from lung cancer allegedly caused by the combination of asbestos exposure and cigarette smoking. (A.B., p. 5). According to the plaintiffs' medical expert witnesses, Mr. Gaylord's cancer is terminal. *Id.*

a. *Mr. Gaylord's Smoking*

Mr. Gaylord smoked cigarettes for 34 years, until only two months before being diagnosed with lung cancer. (A.B., p. 5). Mr. Gaylord smoked an average of one-half to three-quarters of a pack of cigarettes each day, and, during some periods, smoked as much as two packs per day. *Id.* The plaintiffs' medical experts agreed that Mr. Gaylord's smoking was a substantial factor in causing his lung cancer. *Id.*

b. *Mr. Gaylord's Asbestos Exposure*

From 1958 until he retired from Kaiser in 1987, Mr. Gaylord operated a tracer lathe, a machine that follows templates to machine parts to precise tolerances. (A.B., p. 6). At trial, Mr. Gaylord testified that most of the asbestos-containing parts

on which he worked were for the Minuteman and Advanced Minuteman systems, and that he machined some 90 percent, or, in his words, "thousands and thousands," of Advanced Minuteman nosecones, which used an asbestos-containing tapewrap supplied by Raybestos-Manhattan. *Id.*, pp. 6-7. Mr. Gaylord also recalled working on the Polaris, on which U.S. Polymeric's asbestos-containing tapewrap was used. *Id.*, pp. 4, 6. With respect to the Poseidon, for which U.S. Polymeric also supplied asbestos-containing tapewrap, Mr. Gaylord testified that he only worked on a few of the subassemblies for these missiles, and the plaintiffs did not contend this was a significant source of any asbestos exposure. *Id.*, p. 7. Kaiser also purchased substantial quantities of asbestos-containing materials from other suppliers, including Dexter and Raybestos-Manhattan. *Id.*, pp. 6-7.

B. *Procedural Background*

Plaintiffs filed their personal injury action on May 4, 1988, alleging design defect and failure-to-warn claims under California law against BP Chemicals and numerous other defendants. (Plaintiffs' Complaint (reproduced in Petitioner's Appendix at Tab 4)). Plaintiffs theory of liability against BP Chemicals was that Mr. Gaylord was exposed to asbestos contained in U.S. Polymeric's tapewrap while lathing missile parts, that these exposures combined with his cigarette smoking to cause lung cancer, and that U.S. Polymeric failed to warn Mr. Gaylord, or other workers at Kaiser who handled asbestos-containing tapewrap, of asbestos health hazards. (A.B., pp. 7-8).

In defense, BP Chemicals contended that Mr. Gaylord's cancer was caused by cigarette smoking alone, and that, in any event, his alleged exposures to FM 5075 and FM 5076 were too insubstantial to have caused any health risk. (A.B., p. 10). As an affirmative defense, BP Chemicals also presented the "government contractor defense" established by this Court in *Boyle v. United Technologies*, 487 U.S. 500 (1988) ("Boyle").[2] *Id.*, pp. 10-11. Before trial, the plaintiffs dismissed their actions against

[2]The Boyle government contractor defense, which is discussed more fully herein, precludes tort liability for design defects in military products or

all defendants except BP Chemicals and one other, who settled with the plaintiffs at the midpoint of the trial. *Id.*, p. 3.

After taking evidence on liability issues during the second half of the trial,[3] the parties presented cross-motions to determine the applicability of the government contractor defense to the plaintiffs' design defect and failure-to-warn claims. (A.B., p. 11; BP Chemicals' Motion for Direct Verdict (reproduced in Petitioner's Appendix at Tab 6)). The court struck the defense with respect to both causes of action, expressly relying on the cases of *In re Hawaii Federal Asbestos Cases (Kaiu v. Raymark)*, 960 F.2d 806 (9th Cir. 1992) (holding that commercial asbestos insulation used on Navy ships is not "military," rendering *Boyle* inapplicable) and *Jackson v. Deft, Inc.*, 223 Cal.App.3d 1305, 273 Cal.Rptr. 214 (1990) (*Boyle* defense inapplicable where United States did not prevent manufacturer from supplying warning with product). (Reporter's Transcript of June 23, 1992, Hearing (reproduced in Petitioner's Appendix at Tab 7)).

The court then instructed the jury under California strict products liability law in the rules to apply in determining BP Chemi-

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equipment from being imposed under state products liability laws in cases where the following three factual elements exist:

(1) the United States approved reasonably precise specifications for the design of the product or equipment;
(2) the equipment was manufactured in conformity with the approve design specifications; and,
(3) the supplier warned the United States of any dangers associated with the use of the equipment that were known to the supplier but not to the United States.

Boyle, 487 U.S. at 512.

[3]The trial was "reverse bifurcated," with damages and causation issues tried in Phase I, and liability issues, including contributory negligence, tried in Phase II.

cals' alleged liability to the plaintiffs.[4] Under these instructions, the jury returned special verdicts finding that Mr. Gaylord's can-

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[4] The court instructed the jury as follows with respect to determining BP Chemicals' liability under the plaintiffs' "design defect" and "failure-to-warn" causes of action:

> In this case plaintiff [*sic*] seeks to establish liability on the part of defendant on one or both of two different claimed bases for recovery.
>
> The first is the claim that the product in question was defective. I am now instruct [*sic*] on the law as it relates to the claim of a defective product.
>
> The manufacturer or distributor of a product is liable for injuries legally caused by a defect in its design which existed when it left the possession of the manufacturer or distributor provided that the injuries resulted from a use of the product that was reasonably foreseeable to the manufacturer or distributor.
>
> A product is defective in design if the product fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.
>
> Plaintiff's second claim is that the product in question was defective in light of the manufacturer's failure to warn. I will now instruct you on the law as it relates to this claim.
>
> A product is defective if the use of the product in a manner that is reasonably foreseeable by the defendant involves a substantial danger that would not readily — not be readily recognized by the ordinary user of the product and the manufacturer fails to give adequate warning of the danger.
>
> The manufacturer has a duty to provide an adequate warning to the consumer of a product of potential risks or side effects which may follow the foreseeable use of the product, and which are known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge at the time of manufacture and distribution.
>
> In deciding whether defendants should be held strictly liable for the injury to the plaintiff, you are to focus on the condition of the asbestos-containing products themselves, and not on the reasonableness of defendant's conduct.
>
> There is no requirement that a manufacturer must give a warning which could not be effective in lessening the plaintiff's risk of harm.
>
> In a strict liability action, it is no defense that BP Chemicals had no actual knowledge the products were defective.

cer was linked to asbestos exposure, and that the plaintiffs had suffered a total of $1,504,000 in past and future economic and non-economic damages. (Phase I Special Verdict Form, Nos. 3-5 (reproduced in Petitioner's Appendix at Tab 9)). The jury allocated liability as follows: 10 percent to Mr. Gaylord, for his contributory negligence in smoking; 25 percent to BP Chemicals; and 65 percent to other parties who were responsible for Mr. Gaylord's asbestos exposure. (Phase II Special Verdict Form, No. 6 (reproduced in Petitioner's Appendix at Tab 9)). After adjusting the award for settlement credits and applying California law limiting liability for non-economic damages in proportion to comparative fault, the court entered judgment against BP Chemicals for $981,159. (Judgment Nunc Pro Tunc (reproduced in Petitioner's Appendix at Tab 15)). Subsequently, the court denied BP Chemicals' motion for a new trial. (Order Denying Motion for New Trial (reproduced in Petitioner's Appendix at Tab 14)).

BP Chemicals then appealed to the California Court of Appeal. (Notice of Appeal (reproduced in Petitioner's Appendix at Tab 13)). Among other issues, BP Chemicals argued that the trial court erred in striking the government contractor defense with respect to the plaintiffs' design defect claims. (A.B., pp. 15-30). With respect to the failure-to-warn claims, BP Chemicals presented several defenses based on state law, in recognition of the First District's recent ruling, in *Jackson v. Deft, Inc., supra*, 223 Cal.App.3d 1305, that the *Boyle* defense is inapplicable to failure-to-warn claims except under certain exceptional circumstances not existing in this case.[5]

In their opposition brief, the plaintiffs did not seriously dispute that the trial court's order striking the government contractor

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(Reporter's Transcript of June 24, 1992, Proceedings (reproduced in Petitioner's Appendix at Tab 8)).

[5] BP Chemicals' state-law defenses were based, in part, on the lack of evidence that any warnings U.S. Polymeric could have given would have reached Kaiser factory workers. Mr. Gaylord, for example, testified that he was never notified of the asbestos health warnings that were included with shipments of FM 5075 and FM 5076 beginning in the mid-1970s. (A.B., pp. 34-37).

defense with respect to their design defect claims was clearly erroneous. Instead, the plaintiffs based their opposition upon the inapplicability of the government contractor defense to their failure-to-warn claims, arguing that, regardless of how the Court of Appeal resolved the appeal from the design-defect verdict, the defense should not be applied to their failure-to-warn claims. (Opening Brief of Respondents and Cross-Appellants (reproduced in Petitioner's Appendix at Tab 18), pp. 26-28). Finding the issue squarely before it, the Court of Appeal affirmed the judgment based on the inapplicability of the government contractor defense to the failure-to-warn claims. (Memorandum Opinion of Court of Appeal (reproduced in Petitioner's Appendix at Tab 20), pp. 8-10). The Court of Appeal's only comment with respect to the application of the government contractor defense to the plaintiffs' design defect claims was that "[w]e need not reach that issue because the problem here is that defendants were unable to demonstrate a 'significant conflict,' indeed any conflict, between their state duty to warn and the government specifications for the tape." *Id.*, p. 9.

After the Court of Appeal denied BP Chemicals' petition for rehearing (reproduced in Petitioner's Appendix at Tab 21), BP Chemicals timely petitioned the California Supreme Court for review. (Petition for Review (reproduced in Petitioner's Appendix at Tab 24)). The state supreme court denied the petition on October 13, 1994, leaving BP Chemicals with the present petition for a writ of certiorari to the California Court of Appeal as its sole remaining recourse. (Order Denying Petition for Review (reproduced in Petitioner's Appendix at Tab 27)).

REASONS FOR GRANTING THE PETITION

A grant of certiorari is necessary in this case to establish, in state law products liability cases arising from the United States' procurement of military equipment to which the government contractor defense potentially applies, that federal law determines whether a cause of action is preempted as one for "liability for design defects in military equipment," *Boyle,* 487 U.S. at 512, regardless of whether that cause of action is denominated under state law as a "design defect" or "failure-to-warn" claim. Since

the Court's decision in *Boyle* nearly seven years ago, this issue has been implicit in cases alleging various state tort claims, including, in particular, claims for liability for failures to warn ultimate users of military equipment of alleged design defects.

An important split in authority exists among the United States Circuit and state high courts with respect to the treatment, under the government contractor defense, of products liability claims denominated as "failure-to-warn," rather than "design defect" causes of action. This split in authority has substantially undermined the uniformity of liability rules in actions against government contractors that *Boyle* was intended to accomplish. The current majority view, furthermore, practically eviscerates the defense in a great many cases. Under this view, the *Boyle* defense is held generally inapplicable to claims for liability based on a "failure to warn" ultimate users of the alleged design defect, even in cases where the court finds that *Boyle* clearly precludes a plaintiff's state-law "design defect" claims.

Under the majority rule, therefore, the effectiveness of the government contractor defense often hinges on whether, under the facts of the case, a particular state's tort laws allow a plaintiff to state a cause of action for failure to warn separately from a "design defect" claim, not whether the elements of the *Boyle* defense are found to exist. In this substantial way, the liability of suppliers for design defects in military equipment is still controlled by state law, nearly seven years after *Boyle*.

Although, in a significant minority of jurisdictions, the government contractor defense has been broadly applied to state products liability claims regardless of the particular denomination of that claim under state law (*e.g.*, "design defect," "failure-to-warn" or "breach of warranty"), these courts have not advanced any consistent rationale underlying their holdings. The minority view, however, is consistent with the proper view that, to preserve the uniformity of rules governing government contractor liability that is a "key justification" for the government contractor defense, *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989), *cert. denied*, (1990) 494 U.S. 1030, *reh. denied*, (1990) 495 U.S. 942, 110 S.Ct. 2199 (1990), uniform federal rules must be applied to determine whether the substance of a

plaintiff's state law claim is for "liability for design defects" for purposes of applying the *Boyle* defense.

Petitioner suggests that a readily available reference for determining whether a state law products liability claim is a claim for "liability for design defects" for purposes of the government contractor defense can be found in section 402A of the Restatement (Second) of the Law of Torts (hereinafter, "the Restatement"). Adoption of the Restatement section as the reference for determining this issue would ensure uniformity of application of an effective government contractor defense, while displacing state law to the minimum extent necessary consistent with this purpose. The Restatement section groups claims for failures to warn ultimate users of product defects within claims for liability for defective product designs.

As noted, the California Court of Appeal's ruling that the government contractor defense does not, absent exceptional circumstances, apply to failure-to-warn claims, was dispositive of petitioner's appeal. As discussed herein, had the Court of Appeal reviewed the issue, it would have been required to reverse the trial court's order striking the government contractor defense as to the plaintiffs' design defect claims. The Court, therefore, should grant the requested writ of certiorari to establish that uniform federal, not state, law determines the tort claims to which the government contractor defense is applicable, and that many state law claims for a "failure to warn" ultimate users of defects in product design, like state law "design defect" claims, are claims for "liability for design defects" for purposes of the government contractor defense.

I. A SPLIT IN AUTHORITY EXISTS WITH RESPECT TO THE TREATMENT OF FAILURE-TO-WARN CLAIMS UNDER THE GOVERNMENT CONTRACTOR DEFENSE, DEROGATING THE UNIFORMITY OF APPLICATION AND EFFECTIVENESS OF THE *BOYLE* DEFENSE

The Court held in *Boyle* that, in cases where its factual predicate exists, the federal common-law government contractor defense displaces state tort theories alleging "liability for design

defects" in military equipment. *Boyle, supra*, 487 U.S. at 512. The circuit courts of appeal and state high courts construing this crucial phrase, however, have split over the issue of whether the *Boyle* defense is strictly limited in application to causes of action denominated under state law as "design defect" claims, or whether the defense applies more broadly to other products liability claims for injury or death caused by defective equipment designs, including, in particular, claims for failures to warn ultimate users of alleged design defects. Because of this split in authority, the uniformity and effectiveness of rules governing government contractor liability that *Boyle* was intended to accomplish have been seriously diminished.

A minority of the courts deciding the issue, including the fifth and sixth circuit courts of appeal, have held that the government contractor defense applies broadly to state-law claims for liability for design defects, including claims for failures to warn ultimate users. The courts in most of these cases, however, have simply cited to Boyle for support, rather than providing a detailed discussion of the issue. *See: Smith v. Xerox Corp.*, 866 F.2d 135, 136-37 (5th Cir. 1989) (*Boyle* applicable to design defect, failure-to-warn and breach of warranty claims); *Niemann v. McDonnell Douglas Corp.*, 721 F.Supp. 1019, 1024 (S.D. Ill. 1989) (*Boyle* applicable to design defect and failure-to-warn claims); *Miller v. United Technologies, slip. op*, Nos. CV 85 022 17 88S, CV 85 022 75 18S, 1993 Westlaw 280191 (Conn. Super., July 16, 1993) (following *Niemann*).

In other cases, including some decided previously to *Boyle*, the courts have held the government contractor defense generally applicable to failure-to-warn claims based on the theory that "warnings in general are safety components of the product, the existence of which are dictated by the design specifications," *Ramey v. Martin-Baker Aircraft Co.*, 656 F.Supp. 984, 999-1000 (D.Md. 1987) *aff'd*, 874 F.2d 946 (4th Cir. 1989), or on the basis that *Boyle* displaces all state products liability laws when such laws are in "significant conflict" with the United States' interests in the performance of military procurement contracts. *In re Aircraft Crash Litigation Frederick, Maryland*, 752 F.Supp. 1326, 1365 (S.D. Ohio 1990), *aff'd*

sub nom Darling v. Boeing (table). *Cf., McKay v. Rockwell Intern. Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. den.*, 464 U.S. 1043 (1984) (holding defense applicable to Restatement (Second) of Torts § 402A causes of action in wrongful death action under Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-67); *but see, In re Hawaii Federal Asbestos Cases (Kaiu v. Raymark Industries, Inc.)*, 960 F.2d 806 (9th Cir. 1994) (holding *Boyle* generally inapplicable to state-law failure-to-warn claims).

The majority of courts deciding the issue, including the second, ninth and eleventh circuit courts of appeal, and several state high courts, on the other hand, have held that the government contractor defense is generally inapplicable to state-law causes of action other than "design defect" claims, and only applies to failure-to-warn claims under exceptional circumstances. *In re Joint E. & S. Dist. New York Asbestos Litigation (Grispo v. Eagle-Picher Industries, Inc.)*, 897 F.2d 626 (2d Cir. 1990) ("*New York Asbestos Litigation*"); *In re Hawaii Federal Asbestos Cases, supra*, 960 F.2d 806; *Dorse v. Eagle-Picher Industries, Inc.*, 898 F.2d 1487 (11th Cir. 1990). *See also: Jackson v. Deft, Inc., supra*, 223 Cal.App.3d 1305; *Anzalone v. Westech Gear Corp.*, 638 A.2d 1365 (N.J. Super. 1994), *cert. granted*, 645 A.2d 142 (N.J. 1994).

As the Second Circuit held in *New York Asbestos Litigation, supra*, 987 F.2d at 813,

> Stripped to its essentials, the military contractor's defense under *Boyle* is to claim, "The Government made me do it." *Boyle* displaces state law only when the Government, making a discretionary, safety-related military procurement decision contrary to the requirements of state law, incorporates this decision into a military contractor's contractual obligations, thereby limiting the duties to warn.

See also: Garner v. Santoro, 865 F.2d 629, 636-37 (5th Cir. 1989) (requiring defendant to prove existence of "an identifiable federal interest or policy in the existence or methods of warning and a

significant conflict between that federal interest or policy and the operation of state law"); *In re Hawaii Federal Asbestos Cases, supra*, 960 F.2d at 813 (quoting *New York Asbestos Litigation); Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc.*, ____ P.2d ____, 63 U.S.L.W. 2344, 1994 Westlaw 657895 (same). The only other circumstance under which these courts hold the *Boyle* defense applicable to failure-to-warn claims is when the failure-to-warn claim is "merely duplicative" of a plaintiff's design defect claim. *Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc., supra, citing, Koutsoubos v. Boeing Vertol, Div. of Boeing Co.*, 553 F.Supp. 340 (E.D. Pa. 1982).

As well as diminishing the uniformity of rules of government contractor liability that *Boyle* was intended to achieve, the majority view seriously undermines the effectiveness of the government contractor defense in a great many cases. Under the majority view, the protection offered by the government contractor defense falls away in many cases where applicable state law allows a plaintiff to state a "failure to warn" claim separately from a "design defect" cause of action. In addition to leaving the liability of government contractors for design defects in military equipment largely controlled by the manner in which state law denominates the substance of a tort claim, the majority view eviscerates the government contractor defense almost entirely in cases, like the present matter, where the jury verdict was based on strict liability. In such cases, it generally will not be possible to establish the government contractor defense, because the danger causing the plaintiff's injury will often have been beyond the grasp of reasonable knowledge at the time the military products at issue were designed and manufactured, and, therefore, would not have been actually considered by either the contractor or the United States.

II. A UNIFORM RULE BASED ON GENERAL PRODUCTS LIABILITY LAW SHOULD BE APPLIED TO DETERMINE WHETHER A PLAINTIFF'S STATE LAW PRODUCTS LIABILITY CLAIMS, INCLUDING FAILURE-TO-WARN CLAIMS, ARE FOR "LIABILITY FOR DESIGN DEFECTS" FOR PURPOSES OF THE GOVERNMENT CONTRACTOR DEFENSE

The need for an effective and uniformly applied government contractor defense that *Boyle* was intended to address requires that the defense, as under the minority view identified above, be applied to products liability claims for design defects in military equipment, regardless of whether those claims are denominated under state law as "design defect" or "failure-to-warn" claims, or in some other manner. Application of the government contractor defense to such claims is the only approach that is consistent with the protection of the United States' important interests in the performance of military procurement contracts that the Court recognized in *Boyle*.

Petitioner suggests that section 402A of the Restatement (Second) of the Law of Torts provides a readily available reference for determining whether, for purposes of the government contractor defense, a state-law products liability claim comprises a claim for liability for design defects in military equipment. Adopting the general common law liability rules set forth in the Restatement section for this purpose would ensure the uniform application of an effective government contractor defense, while displacing state law to the minimum extent necessary consistent with this purpose. Adopting a uniform rule on this issue would also be consistent with the treatment of state law claims in other areas concerning important federal interests, in which uniform federal rules are used for the purpose of characterizing the substance of a plaintiff's claims.

A. Applying the Government Contractor Defense Broadly to State Law Claims for Liability for Design Defects Is the Only Approach Consistent With *Boyle*

In *Boyle*, the Court adopted a "broad formulation of the government contractor defense" to ensure uniformity in the rules

governing the liability of suppliers for defects in products supplied to the United States in conformity with government-approved designs. *Harduvel v. General Dynamics Corp., supra,* 878 F.2d at 1317. The only limitation the Court placed on the defense was to exempt claims for manufacturing defects. *Id.* at 1317. Petitioner submits that there is no sound reason for authorizing an additional exemption for claims based on a failure to warn ultimate users of the design defect on which a plaintiff's tort claims are based.

The need for a broad formulation of the government contractor defense is particularly apparent in the military procurement context. Ordinary products liability laws should not be applied to claims for liability for design defects in military equipment because military designs must respond to considerations that do not exist in the consumer marketplace — including, specifically, "the trade-off between greater safety and greater combat effectiveness." *Boyle*, 487 U.S. at 511. "Meeting adequately the needs of national defense, not accident costs, is the ultimate standard by which purchases of military equipment should be measured." *McKay v. Rockwell International Corp., supra*, 704 F.2d at 449-50.

Particularly in cases alleging strict products liability, holding the government contractor defense generally inapplicable to failure-to-warn claims substantially erodes the protection of the United States' discretionary design decisions the Court deemed important in *Boyle.* As noted, the jury's failure-to-warn verdict, on which the Court of Appeal based its affirmance, was reached under an instruction that triggered a duty to warn of potential risks that were "knowable in light of the generally recognized and prevailing best scientific and medical knowledge at the time of manufacture and distribution," regardless of whether the risk was actually known, or reasonably could have been known, to a supplier in U.S. Polymeric's position.

The trial court's instruction, which accurately states California law, *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal.3d 987, 1002, 281 Cal.Rptr. 528, 810 P.2d 549 (Cal. 1991) (in bank), as well as general common law principles, cannot be applied in cases involving military equipment designs without frustrating the

United States' interest in the performance of military procurement contracts. The exigencies of the national defense frequently require equipment designs that "push technology towards its limits and thereby incur risks beyond those that would be acceptable for ordinary consumer goods." *Harduvel v. General Dynamics Corp., supra*, 878 F.2d at 1316, *citing, Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986), *cert den.*, 487 U.S. 1233 (1988), *quoting, McKay v. Rockwell International Corp., supra*, 704 F.2d at 449-50. In the military procurement context, there will always be a considerably heightened likelihood that high-technology designs employing cutting-edge materials will one day be found to pose safety risks. The present case presents an excellent example, as U.S. Polymeric and the other suppliers of asbestos-containing tapewrap to Kaiser were unaware of possible health hazards until the 1970s, after which they supplied warnings with the packaging in which their products were delivered. Enforcement of state strict liability claims for failures to warn of alleged design defects, therefore, has the same deleterious "direct effect" on the United States' interests that the Court found worthy of protection in *Boyle*: for example, the contractor could be forced to decline to manufacture government-approved designs. *Boyle*, 487 U.S. at 507.

In addition to conflicting with the United States' interests in the performance of military procurement contracts, the imposition of liability under state tort laws for failures to warn of defects in military equipment designs also fails to serve the policies favoring strict products liability. Both the Seventh and Ninth Circuits have noted, in pre-*Boyle* cases, that neither the purposes of enterprise liability (discouraging consumers from purchasing unsafe products by raising prices to reflect risk) nor market deterrence (deterring manufacturers from marketing unsafe products by encouraging the use of cost-justified safety measures) are furthered through the application of strict liability rules to military equipment suppliers. *McKay v. Rockwell International Corp., supra*, 704 F.2d at 451-52; *Bynum v. FMC Corp.*, 770 F.2d 556, 571-72 (5th Cir. 1985). The other interests normally considered as favoring strict liability — compensation of injury victims and enforcement of reasonable consumer expectations — are also diminished

considerably in the military procurement context. In *Boyle*, for example, the Court held that the government contractor defense applies in the same manner to claims by civilians as to claims by military personnel, even though civilians generally lack the "simple, certain and uniform compensation for injuries or death" the United States provides to military personnel under the Veterans' Benefits Act, 38 U.S.C. § 301, *et seq. Boyle*, 487 U.S. at 510-11; *Harduvel v. General Dynamics Corp., supra*, 878 F.2d at 1316 n.1.

In *Niemann v. McDonnell Douglas Corp.*, 721 F.Supp. 1019 (S.D. Ill. 1989), the United States District Court for the Southern District of Illinois applied the foregoing principles under facts similar to those in the present matter. In that case, which involved an action for wrongful death allegedly caused by a civilian mechanic's exposure to asbestos-containing "rub strips" used in the engine cowlings of military aircraft, the court held that the government contractor defense precluded enforcement of state failure-to-warn claims as having "the same negative effect on military procurement as outlined in *Boyle*," and that "the government's decision on the contents of [the aircraft in question] involves the same balancing of technical, military and even social considerations protected in *Boyle*." *Id.* at 1025. In two other pre-*Boyle* decisions, the government contractor defense was held applicable to failure-to-warn claims arising from allegedly defective swine flu vaccine and to a manufacturer's liability for failure to warn of the danger posed to humans by the accidental injection of brucellosis vaccine, which is intended for cattle. *Boruski v. United States*, 803 F.2d 1421, 1430 (swine flu vaccine); *Burgess v. Colorado Serum Co.*, 772 F.2d 844, 846-47 (11th Cir. 1985), *rehg. den.*, 778 F.2d 793 (4th Cir. 1985), (brucellosis vaccine). More recently, the Eleventh Circuit, in an opinion authored by the Honorable Lewis F. Powell, Jr., sitting by designation, held that the application of the government contractor defense to products liability actions, including claims for liability for failures to warn of alleged design defects, is "a necessary consequence of the incompatibility of modern products liability law with the exigencies of national defense." *Harduvel v. General Dynamics Corp., supra*, 878 F.2d at 1322. In cases where the factual predi-

cate for the defense exists, the *Boyle* government contractor defense should be held applicable to state-law claims for failures to warn of alleged defects in the designs of military equipment.

B. Section 402A of the Restatement (Second) of Torts Provides the Appropriate Reference for Determining Whether a State Products Liability Claim Is for Liability for Design Defects in Military Equipment

Petitioner submits that section 402A of the Restatement (Second) of Torts, which sets forth general common law products liability rules, provides the appropriate reference for determining whether a state products liability claim is for "liability for design defects" for purposes of the government contractor defense. Adopting the Restatement section for this purpose is necessary to ensure that the government contractor defense is effectively and uniformly applied, and displaces state tort law rules only to the minimum extent necessary. Adopting a uniform federal rule in this area is also consistent with the treatment of state-law claims in other areas involving important federal interests, in which federal, rather than state, law is uniformly applied to determine the substance of a plaintiff's claims.

Section 402A of the Restatement sets forth general common law rules for the liability of sellers of products for physical harm to users or consumers. Under the Restatement section, warnings are considered as a feature of the product at issue in determining whether the design is defective. Restatement § 402A, comment h (product sold without adequate warning of danger is "in a defective condition"); comment j (product supplied with appropriate warning "is not in defective condition nor is it unreasonably dangerous"); comment k ("unavoidably unsafe" product, when accompanied by appropriate warning, is neither defective nor unreasonably dangerous). Under section 402A, therefore, a product that is sold without appropriate warnings is considered to be defectively designed. *Id.; Ramey v. Martin-Baker Aircraft Co.*, 656 F.Supp. at 999-1000 (construing warnings as "safety components of the product the existence of which are dictated by the design specifications").

Reference to the Restatement section to determine the substance of a plaintiffs' claims is also implicit under *Boyle*, which relied heavily on the Ninth Circuit's analysis in a DOHSA case applying the government contractor defense to all section 402A claims save those for manufacturing defects. *McKay v. Rockwell Intern. Corp., supra*, 704 F.2d at 446. Displacement of state-law denominations of a plaintiff's cause of action by a uniform, Restatement-based rule is also consistent with the Eleventh Circuit's post-*Boyle* decision in *Harduvel v. General Dynamics Corp., supra*, 878 F.2d at 1317, in which the court ruled that Florida state law denominating the plaintiffs' cause as one for "manufacturing defects" was displaced by federal law determining that the claim was actually one for defective design. Were federal law not controlling of this issue, the Eleventh Circuit explained, "state law could operate either to defeat the defense or to expand it improperly, and the defense could not be applied with the uniformity that is a key justification for the application of federal law." *Id.* Finally, the large majority of United States jurisdictions have adopted rules consistent with those set forth in the Restatement as the basis for their products liability laws. Therefore, adopting section 402A should result in the minimum possible displacement of any conflicting state laws.

Adopting a uniform federal rule controlling the denomination of a plaintiff's claims for purposes of the government contractor defense is also consistent with the treatment of state-law claims in other areas of important federal interests.
Cf., Wilson v. Garcia, 471 U.S. 261, 269 (1985), *quoted in, Felder v. Casey*, 487 U.S. 131,154 n.1 (1988) (concurring opinion of Justice White) ("Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action").

On the other hand, adopting a general rule consistent with the present majority view that the government contractor defense does not generally apply to failure-to-warn claims would result in the displacement of state products liability law only in cases where the United States directly prevented the supplier from giving the product warnings required by state tort law. *New York*

Asbestos Litigation, supra, 987 F.2d at 813. Requiring a "direct conflict between federal and state law" as a prerequisite for the government contractor defense, however, would limit the scope of federal preemption too narrowly. *Boyle, supra*, 487 U.S. at 504, *citing, Florida Lime Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). As the Court explained in *Boyle*, adequately protecting the United States' interests in military procurement requires the displacement of state tort laws that create a "significant conflict" with these interests. *Boyle, supra*, 487 U.S. at 507. Such state tort laws necessarily include failure-to-warn claims. *In re Aircraft Crash Litigation Frederick, Maryland, supra*, 752 F.Supp. at 1365; *cf., Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941), *quoted in, Boyle*, 487 U.S. at 508, n.4 (state law cannot "conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations" in areas of "distinctive federal interest" in which Congress has provided comprehensive legislation).

For the foregoing reasons, Restatement section 402A should be regarded as the appropriate reference for determining whether a state products liability claim is for "liability for design defects" for purposes of the government contractor defense. The Court, therefore, should adopt the Restatement section as the basis for a uniform rule for this purpose.

III. HAD THE COURT OF APPEAL REACHED THE ISSUE, IT WOULD HAVE BEEN COMPELLED TO RULE THAT THE GOVERNMENT CONTRACTOR DEFENSE BARRED PLAINTIFFS' DESIGN DEFECT CLAIMS

Because the Court of Appeal affirmed the judgment based on the plaintiffs' failure-to-warn claims, it did not consider BP Chemicals' arguments on appeal that the trial court should have applied the government contractor defense to the plaintiffs' design defect claims. (Memorandum Opinion of Court of Appeal, p. 9). Had the Court of Appeal reached this issue, however, it would have been required to rule that the defense precluded liability under these claims.

As noted, the trial court struck the government contractor defense on the erroneous basis that the asbestoscontaining tapewrap was not a "military" product. (Reporter's Transcript of June 23, 1992, Hearing). In doing so, the trial court committed at least two separate errors: first, the court adopted the erroneous view that the government contractor defense focuses on the individual component part at issue in a lawsuit, rather than the product procured by the government; and second, even if the court's narrow focus on component parts were proper, the court erroneously ruled that U.S. Polymeric's asbestos-containing ablative tapewrap was not a "military" product. But for these errors, the undisputed evidence would have compelled the Court of Appeal to reverse the jury verdict on the plaintiffs' design defect claims.

A. The Trial Court Erred in Ruling That the Plaintiffs' Lawsuit Did Not Involve the Design of "Military" Products

The trial court struck the government contractor defense on the basis that U.S. Polymeric's asbestos-containing tapewrap was not a "military" product because it erroneously found: (a) that the fact that U.S. Polymeric's asbestos-containing tapewrap may have been developed prior to its involvement with government missile programs precluded application of the government contractor defense; and (b) that small quantities of the tapewrap may have been sold to commercial aerospace manufacturers. (Reporter's Transcript of June 23, 1992, Hearing). The trial court also erred in improperly focusing its inquiry under *Boyle* on the particular parts of the missiles on which the plaintiffs focussed their design defect claims, rather than the missiles themselves, which were the products procured by the government.

1. The Trial Court Erred by Focusing Its Inquiry on the Tapewrap Supplied by U.S. Polymeric Instead of the Missiles Procured by the Government

The trial court erred in focusing its inquiry on the issue of whether U.S. Polymeric's asbestos-containing tapewrap was a "military" product, instead of focussing on the Poseidon and Polaris missile programs on which the tapewrap was used, which

clearly were "military." This exact issue was held as dispositive in *Niemann v. McDonnell Douglas Corp., supra,* 721 F.Supp. 1019, involving the use of asbestos "rub strips" in certain military aircraft designs. Id. at 1021-22. In granting summary judgment for the defendant, the court squarely rejected the plaintiff's contention that the Boyle defense was inapplicable because the asbestos rub strips were not "military," but, instead, were "commercial," "stock products":

> The plaintiff further urges that the government contractor defense is inapplicable in that the asbestos containing product was of such a commercial nature that there can be no federal interest, and thus no conflict exists between federal and state law. The plaintiff argues that the government must have a significant interest in the particular feature it ordered the contractor to make. (citation omitted). As previously stated, the particular products at issue in the instant case are the aircraft themselves and not, as plaintiff urges the court to find, the pieces of asbestos that was [sic] a component of the aircraft.

Id. at 1023.

Furthermore, in every located case that has expressly decided this issue, the courts have uniformly ruled that the correct focus for determining whether a "military" product is involved is on the product as a whole acquired by the government, not the specific part a plaintiff claims was defective. *See: In re Aircraft Crash Litigation Frederick Maryland, supra,* 752 F.Supp. at 1351 (government contractor defense applied to "non-specified equipment on the aircraft" because government "approved the Detail Specification for the aircraft as a whole"); *Smith v. Xerox Corp.* (5th Cir. 1989) 866 F.2d 135, 138; *Maguire v. Hughes Aircraft Corp.* (D.N.J. 1989) 725 F.Supp. 821, 823-24, *aff'd*, 912 F.2d 67 (3d Cir. 1990); *Wilson v. Boeing Co.* (E.D. Pa. 1987) 655 F.Supp. 766, 773.

Had the Court of Appeal reached this issue, therefore, it would have been required to hold that the plaintiffs' lawsuit involved

"military" products. The fact that the foregoing cases involved the designs of military airplanes (*Niemann, In re Aircraft Crash Litigation Frederick, Maryland*) and helicopters (*Boyle*), while the present case involves the designs of strategic guided missiles, does not make any difference with regard to the application of the government contractor defense to the plaintiffs' design defect claims.

2. In the Alternative, the Trial Court Erred by Ruling that U.S. Polymeric's Asbestos-Containing Tapewrap Was Not a "Military" Product

In the alternative, even if the trial court's narrow focus on the design of U.S. Polymeric's asbestos-containing tapewrap were proper, the ruling that the tapewrap was not a "military" product was clearly erroneous. A product is "military" for purposes of the government contractor defense so long as it was selected by the government because of qualities that served the military's purposes. This is true regardless of whether the product was developed before the contractor's involvement in military procurement programs. Furthermore, the defense applies even though a product was sold commercially, so long as the commercial sales were no more than "incidental." Therefore, the trial court erred, regardless of which basis for its ruling was dispositive.

a. A Product Is "Military" if it Was Selected by the Government Because of Qualities That Served The Military's Purposes, Even if Developed Before the Contractor's Involvement in Military Programs

For purposes of the government contractor defense, a product is "military" if it was "produced according to military specifications and used by the military because of particular qualities which serve a military purpose." *Jackson v. Deft, Inc. supra*, 223 Cal.App.3d at 1319. In the instant case, U.S. Polymeric's director of technical support, Don Beckley, established through uncontroverted trial testimony that the tapewrap was manufactured according to detailed military specifications. (A.B., p. 23). Mr. Beckley also testified that the tapewrap was selected for use in support of the Poseidon and Polaris programs because its ablative qualities were required to protect the rocket motor sys-

tems from heat damage. *Id.* Mr. Beckley testified that the military required the use of asbestos-containing tapewrap in these missiles because it was the best material available at the time. *Id.* Hence, the tapewrap was a "military" product under the test set forth in *Jackson v. Deft, Inc.*

So long as these factors are satisfied, it is simply irrelevant to the government contractor defense that the product at issue was originally developed before the contractor's involvement in military programs. *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 839 (2d Cir. 1992) (affirming defendants' summary judgment on design defect claims in cases involving "off the shelf" asbestos products). The government's interest in military procurement would be ill-served were contractors required to invent every component of a military weapons system from scratch for the defense to apply.

b. The Possibility That a Product Was "Incidentally" Sold Commercially Does Not Affect its "Military" Status

Furthermore, the fact that a product may incidentally have been sold on the commercial market does not affect its "military" status under the government contractor defense. *Jackson v. Deft, Inc., supra*, 223 Cal.App.3d at 1319 (rejecting view that "military equipment means a product made exclusively for military use with no commercial purpose"). Instead, the military status of a product is only affected when the majority of a manufacturer's sales are commercial rather than military. *In Re Hawaii Federal Asbestos Cases, supra*, 960 F.2d at 813 (defense inapplicable where "the military constituted a relatively insignificant purchaser," and product was "primarily sold to private companies"); *Dorse v. Armstrong World Industries, Inc.* (Fla. 1987) 513 So.2d 1265, 1269.

In the present case, it was undisputed that U.S. Polymeric's asbestos-containing tapewrap was manufactured almost exclusively for use in military programs. For example, Mr. Beckley testified that, although U.S. Polymeric supplied tapewrap to the commercial aerospace industry, this tapewrap was comprised of fiberglass or other non-asbestos products almost exclusively. (A.B., p. 25). This was because asbestos was only useful as an

ablator, which the commercial aerospace industry did not need. *Id.* Consequently, very little, if any, asbestos-containing products were sold by U.S. Polymeric outside of the military defense industry. *Id.* Any such incidental sales of asbestos-containing tapewrap do not affect the application of the government contractor defense to this case.

B. All of the Elements of the Government Contractor Defense Exist in this Case

During the trial, U.S. Polymeric submitted undisputed evidence in support of each element of the three-prong factual test the Court adopted in *Boyle*. This included undisputed evidence that: the government specifically required U.S. Polymeric's tapewrap, which itself was produced in accordance with detailed government design specifications, to be used the Poseidon and Polaris missile programs; the tapewrap was manufactured in conformity with the government's specifications; and the government's knowledge of asbestos hazards when it procured the tapewrap was far superior to U.S. Polymeric's. Each element of the government contractor defense, therefore, was established by undisputed evidence.

1. The Government Approved the Design of U.S. Polymeric's Tapewrap and Required Its Use in the Poseidon and Polaris Missile Programs

The government's approval of "reasonably precise design" specifications required by *Boyle* is established where, as in the present case, the specifications for the missiles on which U.S. Polymeric's products were used resulted from "back and forth" discussions between the government and its contractors, with the government giving final approval of the design, including the materials to be used. *Harduvel v. General Dynamics Corp., supra*, 878 F.2d at 1320; *Koutsoubos v. Boeing Vertol, supra*, 755 F.2d at 355. The government's approval of design specifications for U.S. Polymeric's tapewrap is also established in another way in this case, as U.S. Polymeric "incorporated government specifications" into the design of the product, which "the government subsequently reviewed and approved." *Harduvel v. General Dynamics Corp., supra*, 878 F.2d at 1320; *Smith v. Xerox Corp., supra*, 866 F.2d at 138.

At trial, Mr. Beckley testified at length regarding the design and development process involved in the Poseidon missile program, through which the government selected the materials that would be required for missile production, as a typical example of the government's management of missile programs. (A.B., p. 26). This process began with the military's decision to develop a new missile with particular characteristics. *Id.* The military then called in a prime contractor, who, in turn, sought subcontractors with expertise in various areas, including rocket propulsion. *Id.* During this time, the contractors' suppliers, including U.S. Polymeric, would assist in identifying which of their products would be best for use in missile parts to be supplied, and would determine whether new, improved materials could be developed. *Id.*, pp. 26-27. The government required these materials to be rigorously tested; for example, the U.S. Polymeric products that were used in rocket motor construction were subjected to at least 120 motor test firings before receiving government approval. *Id.*, p. 27.

Eventually, as a result of this back-and-forth process between the government and the contractors, the design of the missile, including materials specifications, was finalized into a government Weapon Specification. (A.B., p. 27). The Weapon Specification governing the design of the Poseidon missile was WS 8911. *Id.* The Weapon Specification listed the exact materials that would become part of the "qualified products list" for manufacturing the missile's component parts. *Id.* Once the Weapon Specification was finalized, the suppliers, including U.S. Polymeric, were prohibited from deviating from its specifications either in the raw materials they used or in the process by which their products were made. *Id. No changes were allowed.* For example, when U.S. Polymeric decided to stop manufacturing asbestos products, *it was required under federal law to continue supplying asbestos-containing tapewrap when its product was the only one qualified for use on a missile program. Id.*

Therefore, the government clearly approved reasonably precise design specifications for the products at issue in this case. As set forth above, the designs of the missiles in which U.S. Polymeric's tapewrap was used were developed through a "back and forth" process between the military and its suppliers, with the military

exercising final design approval. Moreover, U.S. Polymeric's asbestos-containing tapewrap was manufactured according to military specifications, and was reviewed and approved by the military for use in the missiles. Finally, the applicable Weapon Specification prohibited U.S. Polymeric from deviating in the materials or processes used to manufacture its asbestos-containing tapewrap. Hence, the first element of the *Boyle* test was clearly satisfied by the undisputed trial evidence.

2. Both U.S. Polymeric's Tapewrap and the Missiles in Which it Was Used Were Manufactured in Conformity With the Design Specifications

The second prong of the *Boyle* test requires that the contractor have supplied the product in conformity with the government-approved specifications. *Boyle*, 487 U.S. at 512. The courts have held that product conformity for purposes of the government contractor defense can be established in several ways. First, conformity can be established by showing that the government accepted and used the finished product. *Smith v. Xerox Corp., supra,* 866 F.2d at 138-39; *Niemann v. McDonnell Douglas Corp., supra,* 721 F.Supp. at 1337; *Hazard, Inc. v. Panco* (Va. 1990) 240 Va. 438, 397 S.E.2d 866, 868. Conformity also can be established when the government used the product for several years, or performed inspections or maintenance and then returned the product to service. *Smith v. Xerox Corp., supra,* 866 F.2d at 138. Where, as in the present case, there was no contrary evidence submitted, the courts have consistently accepted either one of these methods as sufficient to establish the second prong of the *Boyle* test. *See: Niemann v. McDonnell Douglas Corp., supra,* 721 F.Supp. at 1027; *Smith v. Xerox Corp., supra,* 866 F.2d at 138-139.

At trial, the plaintiffs did not submit any evidence that either the missiles or U.S. Polymeric's tapewrap, as manufactured, deviated in any way from their design specifications. Instead, the plaintiffs' case against U.S. Polymeric was based on the use of asbestos in the tapewrap, which was required by the government. Further, BP Chemicals introduced evidence that U.S. Polymeric's tapewrap was inspected after delivery to Kaiser, to ensure it was suitable for use on the missile programs. (A.B., p. 29).

Accordingly, there is no dispute that both the missiles in which U.S. Polymeric's tapewrap was used, like the tapewrap itself, were manufactured in conformity with their design specifications. Therefore, the second element of the *Boyle* test is satisfied.

3. The Government Had Superior Knowledge of Asbestos Hazards

The third prong of the *Boyle* test requires that the supplier have warned the government of all dangers in the use of the product that were actually known to the supplier but not to the government. *Boyle*, 487 U.S. at 512. The test does not require the contractor to warn of dangers of which the government actually knew. *Stout v. Borg-Warner Corp., supra,* 933 F.2d 331, 336 (5th Cir. 1991); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1487 (5th Cir. 1989) *reh'g den.*, 876 F.2d 1154 (5th Cir. 1989); *cert. den.*, 493 U.S. 935 (1989); *Niemann v. McDonnell Douglas Corp., supra,* 721 F.Supp. at 1028.

At trial, it was undisputed that, until the mid-1970s, U.S. Polymeric was not aware of any health hazards associated with asbestos-containing tapewrap, and that, after learning of the hazard, it included warnings with the packaging in which its asbestos-containing products were delivered. (A.B., pp. 29-30). It was also undisputed that the government had knowledge of asbestos hazards from at least 1946 onward. *Id.*, p. 30. Consequently, U.S. Polymeric lacked any duty to warn the government of asbestos hazards, and, therefore, the third element of the *Boyle* test is satisfied, as well.

C. Had it Reached the Issue, the Court of Appeal Would Have Been Required to Rule That the Government Contractor Defense Applied to the Plaintiffs' Design Defect Claims

For the reasons set forth above, had the Court of Appeal considered the application of the government contractor defense to the plaintiffs' design defect claims, it would have been compelled by the undisputed evidence to rule that every element of the government contractor defense was satisfied. Consequently, the Court of Appeal would have been required to reverse the jury verdict for the plaintiffs on the design defect claims.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari in this matter.

DATED: January 10, 1995

KENNEY, BURD & MARKOWITZ

By: STEPHEN C. KENNEY

STEPHEN C. KENNEY
TOM K. HAMMITT
Counsel for Petitioner
BP CHEMICALS (HITCO) INC.

Supreme Court, U.S.
FILED

941220 JAN 11 1995
No. 891562

OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

BP CHEMICALS (HITCO) INC.,
Petitioner,
v.
ROBERT and JANET GAYLORD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

STEPHEN C. KENNEY
TOM K. HAMMITT
KENNEY, BURD & MARKOWITZ
Two Embarcadero Center,
Suite 740
San Francisco, California 94111
Telephone: (415) 397-3100
Counsel for Petitioner
BP CHEMICALS (HITCO) INC.

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

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APPENDIX 1

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX 2

[487 US 500]

DELBERT BOYLE, Personal Representative of the Heirs and Estate of DAVID A. BOYLE, Deceased, Petitioner

v

UNITED TECHNOLOGIES CORPORATION

487 US 500, 101 L Ed 2d 442, 108 S Ct 2510, reh den (US) 108 L Ed 2d 248, 109 S Ct 1182

[No. 86-492]

Argued October 13, 1987. Reargued April 27, 1988. Decided June 27, 1988.

Decision: Federal contractor held to have conformity-to-specifications defense to assertion that contractor was liable, under state tort law, to third persons for design defect in military equipment.

SUMMARY

A United States Marine helicopter copilot drowned when he was unable to escape after his helicopter crashed in the ocean, off the Virginia coast, during a training exercise. The copilot's father, on behalf of himself, the copilot's mother, and three sisters, (1) filed a diversity action against the helicopter manufacturer in a Federal District Court, and (2) included a claim of negligence and breach of warranty by the manufacturer in the design of the copilot's escape hatch. After the jury awarded $725,000 against the manufacturer, the manufacturer moved for a judgment notwithstanding the verdict, on the basis, with respect to the alleged design defect, of a "military contractor" or "government contractor" defense — that is, that the escape hatch's design conformed to the specifications in the contract which ob-

tained the helicopter for the Federal Government. The District Court, however, denied the motion. On appeal, the United States Court of Appeals for the Fourth Circuit reversed, and expressed the view that (1) such a defense was available to the manufacturer; and (2) with respect to the alleged design defect, the manufacturer had satisfied the requirements of the defense (792 F2d 413).

On certiorari, the United States Supreme Court vacated the judgment and remanded the case. In an opinion by SCALIA, J., joined by REHNQUIST, Ch. J., and WHITE, O'CONNOR, and KENNEDY, JJ., it was held that (1) based upon the federal policy demonstrated by the Federal Tort Claims Act's discretionary function exception to Federal Government liability (28 USCS § 2680(a)), as applied to the selection of the appropriate design for military equipment to be used by the United States Armed Forces, federal common law displaces state law with respect to the extent of any government contractor defense — a defense of conformity to contract specifications by a contractor providing military equipment to the Federal Government, when the contractor is asserted to be liable, under state tort law, to third persons for injury caused by a design defect in the equipment; (2) such a government contractor defense exists where (a) the United States approved reasonably precise specifications, (b) the equipment conformed to those specifications, and (c) the contractor warned the United States about the dangers in the use of the equipment that were known to the contractor but not to the United States; (3) even though the Court of Appeals, in the case at hand, adopted a formulation of the defense that differed from the instructions given by the Federal District Court to the jury, the Federal Constitution's Seventh Amendment guaranty of a jury trial did not require a remand for trial on the new theory, if the evidence presented in the first trial would not have sufficed, as a matter of law, to support a jury verdict under the properly formulated defense; (4) vacation and

remand were necessary because it was unclear from the language of the Court of Appeals' opinion whether the Court of Appeals was (a) permissibly deciding that no reasonable jury could, under the properly formulated defense, have found against the manufacturer on the facta presented, or (b) erroneously making its own assessment whether the defense had been established; (5) if the Court of Appeals was making the former decision, the Court of Appeals' judgment would stand; but (6) if the Court of Appeals was making the latter assessment, the Court of Appeals would have to undertake the proper sufficiency-of-the-evidence inquiry on remand.

BRENNAN, J., joined by MARSHALL and BLACKMUN, JJ., dissenting, expressed the view that (1) the Supreme Court lacked both the authority — under a theory of federal common law — and the expertise to fashion a rule of Federal Government contractor immunity; (2) the § 2680(h) discretionary function exception to liability did not support an immunity from liability under state tort law to third persons, for the discretionary acts of a federal contractor; and (3) the exercise of legislative power to create such a rule of immunity should be left to Congress.

STEVENS, J., dissenting, expressed the view that Congress was better equipped to determine such a novel question of policy, which involved a balancing of the conflicting interests in (1) the efficient operation of a massive government program, and (2) the protection of the rights of the individual.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

8 Am Jur 2d, Aviation §§ 155-157; 35 Am Jur 2d, Federal Tort Claims Act §§ 15-18, 34-36, 70, 75; 63 Am Jur 2d, Products Liability §§ 665-671, 817

31 Federal Procedure, L Ed, Tort Claims Against the United States §§ 73:349, 73:350

22 Am Jur Trials 517, Helicopter Accident Litigation

28 USCS 2680(a)

Am Law Prod Liab 3d §§ 45:1-45:26, 99:1D

US L Ed Digest, Claims § 12; States, Territories, and Possessions § 46; Torts § 5

Index to Annotations, Armed Forces; Conflict of Laws; Defenses; Design of Products and Structures; "Discretionary Function or Duty"; Helicopters; Pre-Emption; Public Works and Contracts

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

What issues will the Supreme Court decide, though not, or not properly, raised by the parties. 42 L Ed 2d 946.

Supreme Court's construction of Seventh Amendment's guaranty of right to trial by jury. 40 L Ed 2d 846.

The Supreme Court and the post-Erie federal common law. 31 L Ed 2d 1006.

Construction and application of 28 USCS § 2680 excepting specified claims from scope of Federal Tort Claims Act. 6 L Ed 2d 1422.

Right of member of Armed Forces to recover from manufacturer or seller for injury caused by defective military material, equipment, supplies, or components thereof. 38 ALR3d 1247.

Aviation: Helicopter accidents. 35 ALR3d 707.

Right of contractor with federal, state, or local public body to latter's immunity from tort liability. 9 ALR3d 382.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Claims § 12; States, Territories, and Possessions § 46; Torts § 5 — pre-emption of liability — government contractor defense — Federal Tort Claims Act policy

1a-1h. Federal common law displaces state law with respect to the extent of any government contractor defense — a defense of conformity to contract specifications by a contractor providing military equipment to the Federal Government, when the contractor is asserted to be liable, under state tort law, to third persons for injury caused by a design defect in the equipment — because (1) there is, in the procurement of such military equipment, a uniquely federal interest — which is comparable to the federal interest in the civil liability of federal officials for actions taken in the course of their duties — since, even though the dispute is between private parties, the imposition of liability will directly affect the terms of such contracts, for the contractor will either decline to manufacture the specified design, or raise the price, and (2) a significant conflict exists between the operation of state law and the federal policy demonstrated by the Federal Tort Claims Act's discretionary function exception to Federal Government liability (28 USCS § 2680(a)), as applied to the selection of the appropriate design for such military equipment, where permitting the second-guessing of such design judgments through state tort liability would produce the same effect sought to be avoided by the FTCA exception, since contractors would predictably raise their prices to cover, or to insure against, contingent liability for the design. (Brennan, Marshall, and Blackmun, JJ., dissented from this holding; Stevens, J., dissented in part from this holding.)

Claims § 12; States, Territories, and Possessions § 46; Torts § 5 — pre-emption of design defect liability — government contractor defense — elements — Federal Tort Claims Act policy

2a-2e. Under pre-emptive federal common law, a contractor providing military equipment to the Federal Government cannot be held liable, under state tort law, to third persons for injury caused by a design defect in the equipment, where (1) the United States approved reasonably precise specifications, (2) the equipment conformed to those specifications, and (3) the contractor warned the United States about the dangers in the use of the equipment that were known to the contractor but not to the United States; given that such a government contractor defense is based upon the federal policy demonstrated by the Federal Tort Claims Act's discretionary function exception to Federal Government liability (28 USCS § 2680(a)), as applied to the selection of the appropriate design for such military equipment, the first two conditions for the defense are necessary to assure that the design feature in question was considered by a federal officer, not merely by the contractor itself; the third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the contractor to withhold knowledge of risks, since (1) conveying that knowledge might disrupt the contract, but (2) withholding the knowledge would produce no liability. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

Appeal §§ 1161, 1689 — remand for new trial — different formulation of defense — failure to object to instructions

3a-3c. With respect to the government contractor defense — a defense of conformity to contract specifications by a contractor providing military equipment to the Federal Government, when the contractor is asserted to be liable,

under state tort law, to third persons for injury caused by a design defect in the equipment — even though a Federal Court of Appeals, on appeal in a federal diversity case, adopts a formulation of the defense that differs from the instructions given by the Federal District Court to the jury, the Federal Constitution's Seventh Amendment guaranty of a jury trial does not require a remand for trial on the new theory, if the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated defense, for judgment could then properly be entered for the contractor at once, without a new trial — even if the contractor failed to object to jury instructions that expressed the defense differently, and in a fashion that would support a verdict.

Appeal §§ 1462, 1692.3, 1701, 1750 — tort liability — review of sufficiency of the evidence — remand for clarification — judgment to be entered — issue to be considered

4a-4e. With respect to the government contractor defense — a defense of conformity to contract specifications by a contractor providing military equipment to the Federal Government, when the contractor is asserted to be liable, under state tort law, to third persons for injury caused by a design defect in the equipment — on certiorari to review a Federal Court of Appeals determination, in a federal diversity case, that, because a manufacturer had satisfied the requirements of the defense, the manufacturer could incur no liability for a particular alleged defect, the United States Supreme Court will vacate the judgment and remand the case, where it is unclear from the language of the Court of Appeals' opinion whether the Court of Appeals was (1) permissibly deciding that no reasonable jury could, under the properly formulated defense, have found against the manufacturer on the facts presented, or (2) erroneously making its own assessment whether the defense had been estab-

lished; if the Court of Appeals was making the former decision, the Court of Appeals' judgment shall stand, where the party seeking to hold the manufacturer liable has not sought from the Supreme Court, nor has the Supreme Court granted, review of the sufficiency-of-the-evidence determination; however, if the Court of Appeals was making the latter assessment, the Court of Appeals must undertake the proper sufficiency inquiry on remand.

States, Territories, and Possessions § 22 — pre-emption by federal common law — tests

5a-5c. In the absence of either a clear statutory prescription or a direct conflict between federal and state law, federal law does not preempt state law where litigation is purely between private parties and does not touch the rights and duties of the United States; a conclusion that an area of uniquely federal interest exists merely establishes a necessary, not a sufficient, condition for the displacement of state law, for displacement will occur only where (1) a significant conflict exists between an identifiable federal policy or interest and the operation of state law, or (2) the application of state law would frustrate the specific objectives of federal legislation; the conflict with federal policy need not be as sharp as the conflict which must exist for ordinary pre-emption — which occurs when Congress legislates in a field in which states have traditionally occupied — because the fact that the area in question is one of uniquely federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can; in some cases — for example, where the federal interest requires a uniform rule — the entire body of state law applicable to the area conflicts and is replaced by federal rules.

Appeal § 1399.5; Courts § 766 — certiorari — Federal Court of Appeals decision — what reviewable — citation of precedent

6a, 6b. On certiorari to review a Federal Court of Appeals decision as to the extent of a government contractor defense — a defense of conformity to contract specifications by a contractor providing military equipment to the Federal Government, when the contractor is asserted to be liable, under state tort law, to third persons for injury caused by a design defect in the equipment — the United States Supreme Court will not address whether the immunity of federal officials from civil liability might extend to nongovernment employees such as government contractors, where (1) the issue is not before the Supreme Court, and (2) the Supreme Court's citation, in its opinion, of prior official-immunity cases is merely to demonstrate that the liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest. (Brennan, Marshall, and Blackmun, JJ., dissented in part from this holding.)

States, Territories, and Possessions § 46; Torts § 5 — pre-emption of liability — government contractor defense

7a, 7b. Although it may be possible to argue, in some areas of uniquely federal interest, that federal law governs the entire area, and borrows, incorporates, or adopts state law except where a significant conflict with federal law exists, the United States Supreme Court will not expand the theoretical scope of federal pre-emption beyond its practical effect, and, thus, will adopt the more modest terminology that federal law may displace state law, in an area where use of the displacement terminology does not make a practical difference: the extent of any government contractor defense, that is, a defense of conformity to contract specifications by a contractor providing military equipment to the Federal Government, when the contractor is asserted to be liable,

under state tort law, to third persons for injury caused by a design defect in the equipment.

Aeronautics and Space § 1; States, Territories, and Possessions § 46; Torts § 5 — pre-emption of design defect liability — government contractor defense — helicopters

8a, 8b. With respect to the extent of a government contractor defense — a defense of conformity to contract specifications by a contractor providing military equipment to the Federal Government, when the contractor is asserted to be liable, under state tort law, to third persons for injury caused by a design defect in the equipment — state law is generally not pre-empted where a contractor's state-prescribed duty, although not identical to the duty assigned under the contract, is not contrary to any contract duty, because, in such a case, the contractor can comply with both its contractual obligations and the state-prescribed duty of care; even if the state-prescribed duty is precisely contrary to the contract duty, there is not always a significant conflict between the state law and a federal policy or interest, so as to warrant the pre-emption of state law; the Federal Government does not have a significant interest, for purposes of federal pre-emption analysis, in a particular, allegedly defective escape-hatch feature of a helicopter, if a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with such an escape-hatch feature. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented in part from this holding.)

Aeronautics and Space § 1 — liability of manufacturer

9. It is not reasonable to say that a private individual who orders, by model number, a stock helicopter that happens to be equipped with an escape hatch of allegedly defective design cannot sue for the manufacturer's negli-

gence with respect to the hatch mechanism because the individual got exactly what the individual ordered.

Aeronautics and Space § 1; Claims § 82; States, Territories, and Possessions § 46; Torts § 5 — pre-emption of design defect liability — government contractor defense — Federal Tort Claims Act policy against suits by service members — aircraft

10. With respect to the federal pre-emption of state law by a government contractor defense — a defense of conformity to contract specifications by a contractor providing military equipment to the Federal Government, when the contractor is asserted to be liable, under state tort law, to third persons for injury caused by a design defect in the equipment — the United States Supreme Court will not apply a defense based upon the doctrine of Feres v United States (1950) 340 US 135, 95 L Ed 152, 71 S Ct 153, under which the Federal Tort Claims Act (28 USCS §§ 1346(b), 2671-2680) does not cover injuries to United States Armed Forces personnel in the course of military service, because a defense identical to the Feres doctrine would produce results that would be, in some respects, (1) too broad, for such a defense would bar liability for injuries caused to military personnel by (a) a helicopter purchased from stock, or (b) any standard equipment purchased by the Federal Government; or (2) too narrow, for the doctrine, which does not cover injuries caused by the military to civilians, could not be invoked to prevent a civilian's suit against a manufacturer of fighter planes on a state tort theory of needlessly high levels of noise in jet engines. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented in part from this holding.)

Claims § 12 — Federal Tort Claims Act — design of military equipment

11. The selection of the appropriate design for military equipment to be used by the United States Armed Forces is a discretionary function within the meaning of the Federal Tort Claims Act exception to Federal Government liability for a discretionary function or duty (28 USCS § 2860(a)), because such selection often involves not merely engineering analysis, but the balancing of many technical, military, and social considerations, including specifically the tradeoff between greater safety and greater combat effectiveness.

Appeal § 1339.5 — certiorari — Federal Court of Appeals decision — what reviewable

12a, 12b. On certiorari to review a Federal Court of Appeals decision, in a federal diversity case, as to the extent of any government contractor defense — a defense of conformity to contract specifications by a contractor providing military equipment to the Federal Government, when the contractor is asserted to be liable, under state tort law, to third persons for injury caused by a design defect in the equipment — it is inappropriate for the Supreme Court to decide whether the outcome of the case would be different in a suit brought under the Death on the High Seas Act (46 USCS §§ 761 et seq.), where the issue is not before the Supreme Court. (Brennan, Marshall, and Blackmun, JJ., dissented in part from this holding.)

Claims § 12; States, Territories, and Possessions § 46; Torts § 5 — pre-emption of design defect liability — government contractor defense — Federal Tort Claims Act policy

13. A suggested formulation of a government contractor defense to liability, under state tort law, to third persons for injury caused by a design defect in military equipment

provided to the Federal Government — a formulation which would preclude suit only if (1) the contractor did not participate, or participated only minimally, in the design of the defective equipment, or (2) the contractor timely warned the Federal Government of the risks of the design and notified the Federal Government of alternative designs reasonably known by the contractor, and the Federal Government, although forewarned, clearly authorized the contractor to proceed with the dangerous design — will not be adopted because, although such a formulation may represent a reasonable tort rule, the formulation does not protect the federal interest embodied in the Federal Tort Claims Act's discretionary function exception to Federal Government liability (28 USCS § 2680(a)), as applied to the selection of the design of such military equipment, since (1) the design ultimately selected may well reflect a significant policy judgment by federal officials, regardless of whether the contractor rather than those officials developed the design; and (2) it is not sound policy to penalize, and thus deter, active contractor participation of the design process, placing the contractor at risk unless the contractor identifies all design defects. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented in part from this holding.)

Trial § 165 — design defect defense — jury question

14. Whether the facts establish the conditions for a government contractor defense — a defense of conformity to contract specifications by a contractor providing military equipment to the Federal Government, when the contractor is asserted to be liable, under state tort law, to third persons for injury caused by a design defect in the equipment — is a question for the jury.

SYLLABUS BY REPORTER OF DECISIONS

David A. Boyle, a United States Marine helicopter copilot, drowned when his helicopter crashed off the Vir-

ginia Coast. Petitioner, the personal representative of the heirs and estate of Boyle, brought this diversity action in Federal District Court against the Sikorsky Division of respondent corporation (Sikorsky), alleging, inter alia, under Virginia tort law, that Sikorsky had defectively designed the helicopter's copilot emergency escape-hatch system. The jury returned a general verdict for petitioner, and the court denied Sikorsky's motion for judgment notwithstanding the verdict. The Court of Appeals reversed and remanded with directions that judgment be entered for Sikorsky. It found that, as a matter of federal law, Sikorsky could not be held liable for the allegedly defective design because Sikorsky satisfied the requirements of the "military contractor defense."

Held:

1. There is no merit to petitioner's contention that, in the absence of federal legislation specifically immunizing Government contractors, federal law cannot shield contractors from liability for design defects in military equipment. In a few areas involving "uniquely federal interests," state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts. The procurement of equipment by the United States is an area of uniquely federal interest. A dispute such as the present one, even though between private parties, implicates the interests of the United States in this area. Once it is determined that an area of uniquely federal interest is implicated, state law will be displaced only where a "significant conflict" exists between an identifiable federal policy or interest and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation. Here, the state-imposed duty of care that is the asserted basis of the contractor's liability is precisely contrary to the duty imposed by the Government contract. But even in this situation, it would be unreasonable

to say that there is always a "significant conflict" between state law and a federal policy or interest. In search of a limiting principle to identify when a significant conflict is present, the Court of Appeals relied on the rationale of Feres v United States, 340 US 135, 95 L Ed 152, 71 S Ct 153. This produces results that are in some respects too broad and in some respects too narrow. However, the discretionary function exception to the Federal Tort Claims Act does demonstrate the potential for, and suggest the outlines of, "significant conflict" between federal interest and state law in this area. State law is displaced where judgment against the contractor would threaten a discretionary function of the Government. In sum, state law which imposes liability for design defects in military equipment is displaced where (a) the United States approved reasonably precise specifications; (b) the equipment conformed to those specifications; and (c) the supplier warned the United States about dangers in the use of the equipment known to the supplier but not to the United States.

2. Also without merit is petitioner's contention that since the Government contractor defense formulated by the Court of Appeals differed from the instructions given by the District Court to the jury, the Seventh Amendment guarantee of jury trial requires a remand for trial on the new theory. If the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated defense, judgment could properly be entered for respondent at once, without a new trial. It is unclear from the Court of Appeals' opinion, however, whether it was in fact deciding that no reasonable jury could, under the properly formulated defense, have found for the petitioner on the facts presented, or rather was assessing on its own whether the defense had been established. The latter would be error, since whether the facts established the conditions for the defense is a question for the jury. The case is remanded for clarification of this point.

792 F2d 413, vacated and remanded.

Scalia, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, O'Connor, and Kennedy, JJ., joined. Brennan, J., filed a dissenting opinion, in which Marshall and Blackmun, JJ., joined. Stevens, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

Louis Stanton Franecke argued and reargued the cause for petitioner.

Phillip A. Lacovara argued and reargued the cause for respondent.

Donald B. Ayer argued and reargued the cause for the United States, as amicus curiae in support of respondent, by special leave of court.

Briefs of Counsel, p 1064, infra.

OPINION OF THE COURT

[487 US 500]

Justice Scalia delivered the opinion of the court.

[1a, 2a, 3a, 4a] This case requires us to decide when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect.

I

On April 27, 1983, David A. Boyle, a United States Marine helicopter copilot, was killed when the CH-53D helicopter in which he was flying crashed off the coast of Virginia Beach, Virginia, during a training exercise. Although Boyle survived the impact of the crash, he was

unable to escape from the helicopter and drowned. Boyle's father, petitioner here, brought this diversity action in Federal District Court against the Sikorsky Division of United Technologies Corporation (Sikorsky), which built the helicopter for the United States.

[487 US 503]

At trial, petitioner presented two theories of liability under Virginia tort law that were submitted to the jury. First, petitioner alleged that Sikorsky had defectively repaired a device called the servo in the helicopter's automatic flight control system, which allegedly malfunctioned and caused the crash. Second, petitioner alleged that Sikorsky had defectively designed the copilot's emergency escape system: the escape hatch opened out instead of in (and was therefore ineffective in a submerged craft because of water pressure), and access to the escape hatch handle was obstructed by other equipment. The jury returned a general verdict in favor of petitioner and awarded him $725,000. The District Court denied Sikorsky's motion for judgment notwithstanding the verdict.

The Court of Appeals reversed and remanded with directions that judgment be entered for Sikorsky. 792 F2d 413 (CA4 1986). It found, as a matter of Virginia law, that Boyle had failed to meet his burden of demonstrating that the repair work performed by Sikorsky, as opposed to work that had been done by the Navy, was responsible for the alleged malfunction of the flight control system. Id., at 415-416. It also found, as a matter of federal law, that Sikorsky could not be held liable for the allegedly defective design of the escape hatch because, on the evidence presented, it satisfied the requirements of the "military contractor defense," which the court had recognized the same day in Tozer v LTV Corp. 792 F2d 403 (CA4 1986). 792 F2d, at 414-415.

[1b, 2b, 3b, 4b] Petitioner sought review here, challenging the Court of Appeals' decision on three levels: First, petitioner contends that there is no justification in federal law for shielding Government contractors from liability for design defects in military equipment. Second, he argues in the alternative that even if such a defense should exist, the Court of Appeals' formulation of the conditions for its application is inappropriate. Finally, petitioner contends that the Court of Appeals erred in not remanding for a jury determination of whether the elements

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of the defense were met in this case. We granted certiorari, 479 US 1029, 93 L Ed 2d 627, 107 S Ct 872 (1986).

II

[1c, 5a] Petitioner's broadest contention is that, in the absence of legislation specifically immunizing Government contractors from liability for design defects, there is no basis for judicial recognition of such a defense. We disagree. In most fields of activity, to be sure, this Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription, see, e.g., Jones v Rath Packing Co. 430 US 519, 525, 51 L Ed 2d 604, 97 S Ct 1305 (1977); Rice v Santa Fe Elevator Corp. 331 US 218, 230, 91 L Ed 1447, 67 S Ct 1146 (1947), or a direct conflict between federal and state law, see, e.g., Florida Lime & Avocado Growers, Inc. v Paul, 373 US 132, 142-143, 10 L Ed 2d 248, 83 S Ct 1210 (1963); Himes v Davidowitz, 312 US 52, 67, 85 L Ed 581, 61 S Ct 399 (1941). But we have held that a few areas, involving "uniquely federal interests," Texas Industries, Inc. v Radcliff Materials, Inc. 451 US 630, 640, 68 L Ed 2d 500, 101 S Ct 2061 (1981), are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content

prescribed (absent explicit statutory directive) by the courts — so-called "federal common law." See, e.g., United States v Kimbell Foods, Inc. 440 US 715, 726-729, 59 L Ed 2d 711, 99 S Ct 1448 (1979); Banco Nacional v Sabbatino, 376 US 398, 426-427, 11 L Ed 2d 804, 84 S Ct 923 (1964); Howard v Lyons, 360 US 593, 597, 3 L Ed 2d 1454, 79 S Ct 1331 (1959); Clearfield Trust Co. v United States, 318 US 363, 366-367, 67 L Ed 898, 63 S Ct 573 (1949); D'Oench, Duhme & Co. v FDIC, 315 US 447, 457-458, 86 L Ed 956, 62 S Ct 676 (1942).

The dispute in the present case borders upon two areas that we have found to involve such "uniquely federal interests." We have held that obligations to and rights of the United States under its contracts are governed exclusively by federal law. See, e.g., United States v Little Lake Misere Land Co. 412 US 580, 592-594, 37 L Ed 2d 187, 93 S Ct 2389 (1973); Priebe & Sons, Inc. v United States, 332 US 407, 411, 92 L Ed 32, 68 S Ct 123 (1947); National Metropolitan Bank v United States, 323 US 454,

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456, 89 L Ed 383, 65 S Ct 354 (1945); Clearfield Trust, supra. The present case does not involve an obligation to the United States under its contract, but rather liability to third persons. That liability may be styled one in tort, but it arises out of performance of the contract — and traditionally has been regarded as sufficiently related to the contract that until 1962 Virginia would generally allow design defect suits only by the purchaser and those in privity with the seller. See General Bronze Corp. v Kostopulos, 203 Va 66, 69-70, 122 SE2d 548, 551 (1961); see also Va Code § 8.2-318 (1965) (eliminating privity requirement).

[1c, 5a] Another area that we have found to be of peculiarly federal concern, warranting the displacement of state law, is the civil liability of federal officials for actions

taken in the course of their duty. We have held in many contexts that the scope of that liability is controlled by federal law. See, e.g., Westfall v Erwin, 484 US 292, 295, 98 L Ed 2d 619, 108 S Ct 580 (1988); Howard v Lyons, supra, at 597, 3 L Ed 2d 1454, 79 S Ct 1331; Barr v Matteo, 360 US 564, 569-574, 3 L Ed 2d 1434, 79 S Ct 1335 (1959) (plurality opinion); id., at 577, 3 L Ed 2d 1434, 79 S Ct 1335 (Black, J., concurring); see also Yaselli v Goff, 12 F2d 396 (CA2 1926), aff'd 276 US 509, 72 L Ed 395, 48 S Ct 155 (1927) (per curiam); Spalding v Vilas, 161 US 483, 40 L Ed 780, 16 S Ct 631 (1896); Bradley v Fisher, 13 Wall 335, 20 L Ed 646 (1872). The present case involves an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee, but there is obviously implicated the same interest in getting the Government's work done.[1]

We think the reasons for considering these closely related areas to be of "uniquely federal" interest apply as well to

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the civil liabilities arising out of the performance of federal procurement contracts. We have come close to holding as much. In Yearsley v W. A. Ross Construction Co. 309 US 18, 84 L Ed 554, 60 S Ct 413 (1940), we rejected an attempt by a landowner to hold a construction contractor liable under state law for the erosion of 95 acres caused by the contractor's work in constructing dikes for the Government. We said that "if [the] authority to carry out the

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[1] [6b] Justice Brennan's dissent misreads our discussion here to "intimat[e] that the immunity [of federal officials] . . . might extend . . . [to] nongovernment employees" such as a government contractor. Post, at 523, 101 L Ed 2d, at 465. But we do not address this issue, as it is not before us. We cite these cases merely to demonstrate that the liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest.

project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." Id., at 20-21, 84 L Ed 554, 60 S Ct 413. The federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction.

[1e, 5b] Moreover, it is plain that the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one — even though the dispute is one between private parties. It is true that where "litigation is purely between private parties and does not touch the rights and duties of the United States," Bank of America Nat. Trust & Sav. Assn. v Parnell, 352 US 29, 33, 1 L Ed 2d 93, 77 S Ct 119 (1956), federal law does not govern. Thus, for example, in Miree v Dekalb County, 433 US 25, 30, 53 L Ed 2d 557, 97 S Ct 2490 (1977), which involved the question whether certain private parties could sue as third-party beneficiaries to an agreement between a municipality and the Federal Aviation Administration, we found that state law was not displaced because "the operations of the United States in connection with FAA grants such as these . . . would [not] be burdened" by allowing state law to determine whether third-party beneficiaries could sue, id. at 30, 53 L Ed 2d 557, 97 S Ct 2490, and because "any federal interest in the outcome of the [dispute] before us '[was] far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.'" Id., at 32-33, 53 L Ed 2d 557, 97 S Ct 2490, quoting Parnell, supra, at 33-34, 1 L Ed 2d 93, 77 S Ct 119; see also Wallis v Pan American Petroleum

Corp. 384 US 63, 69, 16 L Ed 2d 369, 86 S Ct 1301 (1966).[2] But the same is not true here. The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.

[1f, 5c, 7a] That the procurement of equipment by the United States is an area of uniquely federal interest does not, however, end the inquiry. That merely establishes a necessary, not a sufficient, condition for the displacement of state law.[3] Displacement will occur only where, as we have variously described, a "significant conflict" exists between an identifiable "federal policy or interest and the [operation] of state law," Wallis, supra, at 68, 16 L Ed 2d 369, 86 S Ct 1301, or the application of state law would "frustrate specific objectives" of federal legislation, Kimbell Foods, supra, at 728, 59 L Ed 2d 711, 99 S Ct 1448. The conflict

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[2]As this language shows, Justice Brannan's dissent is simply incorrect to describe Miree and other cases as declining to apply federal law despite the assertion of interests "comparable" to those before us here. Post, at 521-522 101 L Ed 2d, at 464.

[3][7b] We refer here to the displacement of state law, although it is possible to analyze it as the displacement of federal-law reference to state law for the rule of decision. Some of our cases appear to regard the area in which a uniquely federal interest exists as being entirely governed by federal law, with federal law deigning to "borro[w]," United States v Little Lake Misere Land Co. 412 US 560, 594, 37 L Ed 2d 187, 93 S Ct 2389 (1973), or "incorporat[e]" or "adopt" United States v Kimbell Foods, Inc. 440 US 715, 728, 729, 730, 59 L Ed 2d 711.99 S Ct 1448 (1979), state law except where a significant conflict with federal policy exists. We see nothing to be gained by expanding the theoretical scope of the federal pre-emption beyond its practical effect, and so adopt the more modest terminology. If the distinction between displacement of state law and displacement of federal law's incorporation of state law ever makes a practical difference, it at least does not do so in the present case.

with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates "in a field which the States have traditionally occupied." Rice v Santa Fe Elevator Corp. 331 US, at 230, 91 L Ed 1447, 67 S Ct 1146. Or to put the point differently, the

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fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can.[4] But conflict there must be. In some cases, for example where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules. See, e.g., Clearfield Trust, 316 US, at 366-367, 87 L Ed 838, 63 S Ct 573 (rights and obligations of United States with respect to commercial paper must be governed by uniform federal rule). In others, the conflict is more narrow, and only particular elements of state law are superseded. See, e.g., Little Lake Misere Land Co. 412 US, at 595, 87 L Ed 2d 187, 93 S Ct 2389 (even assuming state law should generally govern federal land acquisitions, particular state

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[4]Even before our landmark decision in Clearfield Trust Co. v United States, 318 US 363, 87 L Ed 838, 63 S Ct 579 (1943), the distinctive federal interest in a particular field was used as a significant factor giving broad pre-emptive effect to federal legislation in that field:

"It cannot be doubted that both the state and the federal [alien] registration laws belong 'to that class of laws which concern the exterior relation of this whole nation with other nations and governments.' Consequently the regulation of aliens is . . . intimately blended and intertwined with responsibilities of the national government. . . . And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or subsidiary regulations." Hines v Davidowitz, 312 US 62, 66-67, 85 L Ed 581, 61 S Ct 399 (1941) (citation omitted).

law at issue may not); Howard v Lyons, supra, at 597, 3 L Ed 2d 1454, 79 S Ct 1331 (state defamation law generally applicable to federal official, but federal privilege governs for statements made in the course of federal official's duties).

[8c] In Miree, supra, the suit was not seeking to impose upon the person contracting with the Government a duty contrary to the duty imposed by the Government contract. Rather, it was the contractual duty *itself* that the private plaintiff (as third-party beneficiary) sought to enforce. Between Miree

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and the present case, it is easy to conceive of an intermediate situation, in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed. If, for example, the United States contracts for the purchase and installation of an air-conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context.

[8b, 9] The present case, however, is at the opposite extreme from Miree. Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications). Even in this sort of situation, it would be

unreasonable to say that there is always a "significant conflict" between the state law and a federal policy or interest. If, for example, a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered.

[10] In its search for the limiting principle to identify those situations in which a "significant conflict" with federal policy or interests does arise, the Court of Appeals, in the lead case

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upon which its opinion here relied, identified as the source of the conflict the Feres doctrine, under which the Federal Tort Claims Act (FTCA) does not cover injuries to Armed Services personnel in the course of military service. See Feres v United States, 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950). Military contractor liability would conflict with this doctrine, the Fourth Circuit reasoned, since the increased cost of the contractor's tort liability would be added to the price of the contract, and "[s]uch pass-through costs would . . . defeat the purpose of the immunity for military accidents conferred upon the government itself." Tozer, 792 F2d at 408. Other courts upholding the defense have embraced similar reasoning. See, e.g., Bynum v FMC Corp. 770 F2d 556, 565-566 (CA5 1985); Tillett v J. I. Case Co. 756 F2d 591, 596-597 (CA7 1985); McKay v Rockwell Int'l Corp. 704 F2d 444, 449 (CA9 1983), cert denied, 464 US 1043, 79 L Ed 2d 175, 104 S Ct 711 (1984). We do not adopt this analysis because it seems to us that the Feres doctrine, in its application to the present problem, logically

produces results that are in some respects too broad and in some respects too narrow. Too broad, because if the Government contractor defense is to prohibit suit against the manufacturer whenever Feres would prevent suit against the Government, then even injuries caused to military personnel by a helicopter purchased from stock (in our example above), or by any standard equipment purchased by the Government, would be covered. Since Feres prohibits all service-related tort claims against the Government, a contractor defense that rests upon it should prohibit all service-related tort claims against the manufacturer — making inexplicable the three limiting criteria for contractor immunity (which we will discuss presently) that the Court of Appeals adopted. On the other hand, reliance on Feres produces (or logically should produce) results that are in another respect too narrow. Since that doctrine covers only service-related injuries, and not injuries caused by the military to civilians, it could not be invoked to prevent, for example, a civilian's suit against the manufacturer of fighter planes, based on a state

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tort theory, claiming harm from what is alleged to be needlessly high levels of noise produced by the jet engines. Yet we think that the character of the jet engines the Government orders for its fighter planes cannot be regulated by state tort law, no more in suits by civilians than in suits by members of the Armed Services.

[1g, 2c] There is, however, a statutory provision that demonstrates the potential for, and suggests the outlines of, "significant conflict" between federal interests and state law in the context of Government procurement. In the FTCA, Congress authorized damages to be recovered against the United States for harm caused by the negligent or wrongful conduct of Government employees, to the extent that a private person would be liable under the law of the place

where the conduct occurred. 28 USC § 1346(b) [28 USCS § 1346(b)]. It excepted from this consent to suit, however,

> "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 USC § 2680(a) [28 USCS § 2680(a)].

[1b, 2d, 11, 12a] We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments, see United States v Varig Airlines, 467 US 797, 814, 81 L Ed 2d 660, 104 S Ct 2755 (1984), through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the

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United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some

circumstances present a "significant conflict" with federal policy and must be displaced.[5]

[2e] We agree with the scope of displacement adopted by the Fourth Circuit here, which is also that adopted by the Ninth Circuit, see McKay v Rockwell Int'l Corp. supra, at 451. Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated — i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect

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discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision.

[13] We have considered the alternative formulation of the Government contractor defense, urged upon us by

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[5] [12b] Justice Brennan's assumption that the outcome of this case would be different if it were brought under the Death on the High Seas Act, Act of Mar. 30 1920, ch 111, § 1 et seq., (1962 ed, Supp IV), 41 Stat 537, codified at 46 USC App § 761 et seq. [46 USCS Appx §§ 761 et seq.], is not necessarily correct. That issue is not before us, and we think it inappropriate to decide it in order to refute (or, for that matter, to construct) an alleged inconsistency.

petitioner, which was adopted by the Eleventh Circuit in Shaw v Grumman Aerospace Corp. 776 F2d 736, 746 (1985), cert pending, No. 85-1529. That would preclude suit only if (1) the contractor did not participate, or participated only minimally, in the design of the defective equipment; *or* (2) the contractor timely warned the Government of the risks of the design and notified it of alternative designs reasonably known by it, *and* the Government, although forewarned, clearly authorized the contractor to proceed with the dangerous design. While this formulation may represent a perfectly reasonable tort rule, it is not a rule designed to protect the federal interest embodied in the "discretionary function" exemption. The design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design. In addition, it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects.

III

[3c, 4c] Petitioner raises two arguments regarding the Court of Appeals' application of the Government contractor defense to the facts of this case. First, he argues that since the formulation of the defense adopted by the Court of Appeals differed from the instructions given by the District Court to the jury, the Seventh Amendment guarantee of jury trial required a remand for trail on the new theory. We disagree. If the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated defense, judgment could properly be entered for the respondent at once, without a new trial. And that is so even though (as petitioner claims) respondent failed to

object to jury instructions that expressed the defense differently, and in a fashion that would support a verdict. See St. Louis v Praprotnik, 485 US 112, 118-120, 99 L Ed 2d 107, 108 S Ct 915 (1988) (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., White, and Scalis, JJ.); Ebker v Tan Jay Int'l Ltd., 739 F2d 812, 825-826, n 17 (CA2 1984) (Friendly, J.); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2537, pp 599-600 (1971).

[4d, 14] It is somewhat unclear from the Court of Appeals' opinion, however, whether it was in fact deciding that no reasonable jury could, under the properly formulated defense, have found for the petitioner on the facts presented, or rather was assessing on its own whether the defense had been established. The latter, which is what petitioner asserts occurred, would be error, since whether the facts established the conditions for the defense is a question for the jury. The critical language in the Court of Appeals' opinion was that "[b]ecause Sikorsky has satisfied the requirements of the military contractor defense, it can incur no liability for . . . the allegedly defective design of the escape hatch." 792 F2d, at 415. Although it seems to us doubtful that the Court of Appeals was conducting the factual evaluation that petitioner suggests, we cannot be certain from this language, and so we remand for clarification of this point. If the Court of Appeals are saying that no reasonable jury could find, under the principles it had announced and on the basis of the evidence presented, that the Government contractor defense was inapplicable, its judgment shall stand, since petitioner did not seek from us, nor did we grant, review of the sufficiency-of-the-evidence determination. If the Court of Appeals was not saying that, it should now undertake the proper sufficiency inquiry.

[4e] Accordingly, the judgment is vacated and the case is remanded.

So ordered.

SEPARATE OPINIONS

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Justice Brennan, with whom Justice Marshall, and Justice Blackmun join, dissenting.

Lieutenant David A. Boyle died when the CH-53D helicopter he was copiloting spun out of control and plunged into the ocean. We may assume, for purposes of this case, that Lt. Boyle was trapped under water and drowned because respondent United Technologies negligently designed the helicopter's escape hatch. We may further assume that any competent engineer would have discovered and cured the defects, but that they inexplicably escaped respondent's notice. Had respondent designed such a death trap for a commercial firm, Lt. Boyle's family could sue under Virginia tort law and be compensated for his tragic and unnecessary death. But respondent designed the helicopter for the Federal government, and that, the Court tells us today, makes all the difference: Respondent is immune from liability so long as it obtained approval of "reasonably precise specifications" — perhaps no more than a rubber stamp from a federal procurement officer who might or might not have noticed or cared about the defects, or even had the expertise to discover them.

If respondent's immunity "bore the legitimacy of having been prescribed by the people's elected representatives," we would be duty bound to implement their will, whether or not we approved. United States v Johnson, 481 US 681, 703, 95 L Ed 2d 64B, 107 S Ct 2063 (1987) (dissenting opinion of Scalia, J.). Congress, however, has remained silent — and conspicuously so, having resisted a sustained campaign by Government contractors to legislate for them some

defense.[1] The Court — unelected and unaccountable to the people — has unabashedly stepped into

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the breach to legislate a rule denying Lt. Boyle's family the compensation that state law assures them. This time the injustice is of this Court's own making.

Worse yet, the injustice will extend far beyond the facts of this case, for the Court's newly discovered Government contractor defense is breathtakingly sweeping. It applies not only to military equipment like the CH-53D helicopter, but (so far as I can tell) to any made-to-order gadget that the Federal Government might purchase after previewing plans — from NASA's Challenger space shuttle to the Postal Service's old mail cars. The contractor may invoke the defense in suits brought not only by military personnel like Lt. Boyle, or Government employees, but by anyone injured by a Government contractor's negligent design, including, for example, the children who might have died had respondent's helicopter crashed on the beach. It applies even if the Government has not intentionally sacrificed safety for other interests like speed or efficiency, and, indeed, even if the equipment is not of a type that is typically considered dangerous; thus, the contractor who designs a Government building can invoke the defense when the elevator cable snaps or the walls collapse. And the defense is invocable regardless of how blatant or easily remedied the defect, so long as the contractor missed it and the specifications approved by the Government, however unreasonably dan-

[1] See, e.g., HR 4765, 99th Cong. 2d Sess (1988) (limitations on civil liability of Government contractors); S 2441, 99th Cong. 2d Sess (1988) (same). See also HR 2378, 100th Cong. 1st Sess (1989) (indemnification of civil liability for Government contractors); HR 6883, 98th Cong. 2d Sess (1984) (same); HR 1604, 97th Cong. 1st Sess (1981) (same); HR 6351, 96th Cong. 1st Sess (1979) (same).

gerous, were "reasonably precise." Ante, at 512, 101 L Ed 2d, at 458.

In my view, this Court lacks both authority and expertise to fashion such a rule, whether to protect the Treasury of the United States or the coffers of industry. Because I would leave that exercise of legislative power to Congress, where our Constitution places it, I would reverse the Court of Appeals and reinstate petitioner's jury award.

I

Before our decision in Erie R. Co. v Tompkins, 904 US 64, 82 L Ed 1168, 58 S Ct. 817, 11 Ohio Ops 246, 114 ALR 1487 (1938), federal courts sitting in diversity were generally free, in the absence of a controlling state statute, to fashion

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rules of "general" federal common law. See, e.g., Swift v Tyson, 16 Pet 1, 10 L Ed 865 (1842). Erie renounced the prevailing scheme: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." 304 US, at 78, 62 L Ed 1188, 58 S Ct 817, 11 Ohio Ops 246, 114 ALR 1487. The Court explained that the expansive power that federal courts had theretofore exercised was an unconstitutional "invasion of the authority of the State and, to that extent, a denial of its independence.' " Id., at 79, 82 L Ed 1188, 58 S Ct 817, 11 Ohio Ops 246, 114 ALR 1487 (citation omitted). Thus, Erie was deeply rooted in notions of federalism, and is most seriously implicated when, as here, federal judges displace the state law that would ordinarily govern with their own rules of federal common law. See,

e.g., United States v Standard Oil Co. 332 US 901, 307, 91 L Ed 2067, 67 S Ct 1604 (1947).[2]

In pronouncing that "[t]here is no federal general common law," 904 US, at 78, 82 L Ed 1188, 58 S Ct 817, 11 Ohio Ops 246, 114 ALR 1487, Erie put to rest the notion that the grant of diversity jurisdiction to federal courts is itself authority to fashion rules of substantive law. See United States v Little Lake Misere Land Co. 412 US 580, 591, 37 L Ed 2d 187, 93 S Ct 2389 (1973). As the author of today's opinion for the Court pronounced for a unanimous Court just two months ago, " ' " 'we start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.' " ' " Puerto Rico Dept. of Consumer Affairs v Isla Petroleum Corp. 485 US 495, 500, 99 L Ed 2d 582, 108 S Ct. 1950 (1988) (citations omitted). Just as "[t]here is no federal pre-emption in vacuo, without a constitutional text or a federal statute to assert it," id, at 503, 99 L Ed 2d 582, 108 S Ct 1350, federal common law cannot supersede state law in vacuo out of no

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more than an idiosyncratic determination by five Justices that a particular area is "uniquely federal."

Accordingly, we have emphasized that federal common law can displace state law in "few and restricted" instances.

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[2] Not all exercises of our power to fashion federal common law displaces state law in the same way. For example, our recognition of federal causes of action based upon either the Constitution, see, e.g., Bivens v Six Unknown Fed Narcotics Agents, 403 US 388, 29 L Ed 2d 619, 91 S Ct 1999 (1971), or a federal statute, see Cort v Ash, 422 US 66, 15 L Ed 2d 26, 95 S Ct 2080 (1975), supplements whatever rights state law might provide, and therefore does not implicate federalism concerns in the same way as does pre-emption of a state-law rule of decision or cause of action. Throughout this opinion I use the word "displace" in the latter sense.

Wheeldin v Wheeler, 373 US 647, 651, 10 L Ed 2d 605, 83 S Ct 1441 (1963). "[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of States or our relations with foreign nations, and admiralty cases." Texas Industries, Inc. v Radcliff Materials, Inc. 451 US 630, 641, 68 L Ed 2d 500, 101 S Ct 2061 (1981) (footnotes omitted). "The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." Milwaukee v Illinois, 451 US 304, 312-313, 68 L Ed 2d 114, 101 S Ct 1784 (1981). See also Wallis v Pan American Petroleum Corp. 384 US 63, 68, 16 L Ed 2d 369, 86 S Ct 1301 (1966); Miree v Dekalb County, 433 US 25, 32, 53 L Ed 2d 557, 97 S Ct 2490 (1977). State laws "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." United States v Yazell, 382 US 341, 352, 15 L Ed 2d 404, 86 S Ct 500 (1966).

II

Congress has not decided to supersede state law here (if anything, it has decided not to, see n 1 supra) and the Court does not pretend that its newly manufactured "Government contractor defense" fits within any of the handful of "narrow areas," Texas Industries, supra, at 641, 68 L Ed 2d 500, 101 S Ct 2061, of "uniquely federal interests" in which we have heretofore done so, 451 US, at 640, 68 L Ed 2d 500, 101 S Ct 2061. Rather, the Court creates a new category of

"uniquely federal interests" out of a synthesis of two whose origins predate Erie itself: the interest in administering the "obligations to and rights of the United States under its contracts, " ante,

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at 504, 101 L Ed 2d, at 453, and the interest in regulating the "civil liability of federal officials for actions taken in the course of their duty," ante, at 505, 101 L Ed 2d, at 453. This case is, however, simply a suit between two private parties. We have steadfastly declined to impose federal contract law on relationships that are collateral to a federal contract, or to extend the federal employee's immunity beyond federal employees. And the Court's ability to list 2, or 10, inapplicable areas of "uniquely federal interest" does not support its conclusion that the liability of Government contractors is so "clear and substantial" an interest that this Court must step in lest state law does "major damage." Yazell, supra, at 352, 15 L Ed 2d 404, 86 S Ct 500.

A

The proposition that federal common law continues to govern the "obligations to and rights of the United States under its contracts" is nearly as old as Erie itself. Federal law typically controls when the Federal Government is a party to a suit involving its rights or obligations under a contract, whether the contract entails procurement, see Priebe & Sons v United States, 332 US 407, 92 L Ed 32, 68 S Ct 123 (1947), a loan, see United States v Kimbell Foods, Inc. 440 US 715, 726, 59 L Ed 2d 711, 99 S Ct 1448 (1979), a conveyance of property, see Little Lake Misere, supra, at 591-594, 37 L Ed 2d 187, 93 S Ct 2389 or a commercial instrument issued by the Government, see Clearfield Trust Co. v United States, 318 US 363, 366 87 L Ed 838, 63 S Ct 573 (1943), or assigned to it, see D'Oench, Duhme & Co. v FDIC, 315 US 447, 457, 86 L Ed 956, 62 S

Ct 676 (1942). Any such transaction necessarily "radiate[s] interests in transactions between private parties." Bank of America Nat. Trust & Sav. Assn. v Parnell, 352 US 29, 33, 1 L Ed 2d 93, 77 S Ct 119 (1956). But it is by now established that our power to create federal common law controlling the Federal Government's contractual rights and obligations does not translate into a power to prescribe rules that cover all transactions or contractual relationships collateral to Government contracts.

In Miree v DeKalb County, supra, for example, the county was contractually obligated under a grant agreement wit the Federal Aviation Administration (FAA) to " 'restrict

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the use of land adjacent to . . . the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.' " Id., at 27, 1 L Ed 2d 93, 77 S Ct 119 (citation omitted). At issue was whether the county breached its contractual obligation by operating a garbage dump adjacent to the airport, which allegedly attracted the swarm of birds that caused a plane crash. Federal common law would undoubtedly have controlled in any suit by the Federal Government to enforce the provision against the county or to collect damages for its violation. The diversity suit, however, was brought not by the Government, but by assorted private parties injured in some way by the accident. We observed that "the operations of the United States in connection with FAA grants such as these are undoubtedly of considerable magnitude," id., at 30, 1 L Ed 2d 93, 77 S Ct 119, and that "the United States has a substantial interest in regulating aircraft travel and promoting air travel safety," id., at 31, 1 L Ed 2d 93, 77 S Ct 119. Nevertheless, we held that state law should govern the claim because "only the rights of private litigants are at issue here," id., at 30, 1 L Ed 2d 93, 77 S Ct 119, and the claim

against the county "will have *no direct effect upon the United States or its Treasury,*" id., at 29, 1 L Ed 2d 93, 77 S Ct 119 (emphasis added).

Miree relied heavily on Parnell, supra, and Wallis v Pan American Petroleum Corp., 384 US 63, 16 L Ed 2d 369, 86 S Ct 1301 (1966), the former involving commercial paper issued by the United States and the latter involving property rights in federal land. In the former case, Parnell cashed certain bonds guaranteed by the Government that had been stolen from their owner, a bank. It is beyond dispute that federal law would have governed the United States' duty to pay the value bonds upon presentation; we held as much in Clearfield Trust, supra. Cf. Parnell, supra, at 34, 1 L Ed 2d 93, 77 S Ct 119. But the central issue in Parnell, a diversity suit, was whether the victim of the theft could recover the money paid to Parnell. That issue, we held, was governed by state law, because the "litigation [was] purely between private parties and [did] *not touch the rights and duties of the United States.*" 352 US, at 33, 1 L Ed 2d 93, 77 S Ct 119 (emphasis added).

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The same was true in Wallis, which also involved a Government contract — a lease issued by the United States to a private party under the Mineral Leasing Act of 1920, 30 USC § 181 et seq. (1982 ed and Supp IV) [30 USCS §§ 181 et seq.] — governed entirely by federal law. See 384 US, at 69, 16 L Ed 2d 369, 86 S Ct 1301. Again, the relationship at issue in this diversity case was collateral to the Government contract: It involved the validity of contractual arrangements between the lessee and other private parties, not between the lessee and the Federal Government. Even though a federal statute authorized certain assignments of lease rights, see id., at 69, 70, and n 8, 16 L Ed 2d 369, 86 S Ct 1301, and imposed certain conditions on their validity, see id., at 70, 16 L Ed 2d 369, 86 S Ct 1301,

we held that state law, not federal common law, governed their validity because application of state law would present "no significant threat to any identifiable federal policy or interest," id., at 68, 16 L Ed 2d 369, 86 S Ct 1301.

Here, as in Miree, Parnell, and Wallis, a Government contract governed by federal common law looms in the background. But here, too, the United States is not a party to the suit and the suit neither "touch[es] the rights and duties of the United States," Parnell, supra, at 33, 1 L Ed 2d 93, 77 S Ct 119, nor has a "direct effect upon the United States or its Treasury," Miree, supra, at 29, 53 L Ed 2d 557, 97 S Ct 2490. The relationship at issue is at best collateral to the Government contract.[3] We have no greater power to displace state law governing the collateral relationship in the Government procurement realm than we had to dictate federal rules governing equally collateral relationships in the areas of aviation, Government-issued commercial paper, or federal lands.

That the Government might have to pay higher prices for what it orders if delivery in accordance with the contract exposes

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the seller to potential liability, see ante, at 507, 101 L Ed 2d, at 453, does not distinguish this case. Each of the cases just discussed declined to extend the reach of federal common law despite the assertion of comparable interests that would

[3] True, in this case the collateral relationship is the relationship between victim and forfeiter, rather than between contractors, but that distinction makes no difference. We long ago established that the principles governing application of federal common law in "contractual relations of the Government . . . are equally applicable . . . where the relations affected are noncontractual or tortious in character." United States v Standard Oil Co. 332 US 301, 305, 91 L Ed 2067, 67 S Ct 1604 (1947).

have affected the terms of the Government contract — whether its price or its substance — just as "directly" (or indirectly). Ante, at 507, 101 L Ed 2d, at 454. Third-party beneficiaries can sue under a county's contract with the FAA, for example, even though — as the Court's focus on the absence of "direct effect on the United States or its Treasury," 433 US, at 29, 53 L Ed 2d, 557, 97 S Ct 2490 (emphasis added), suggests — counties will likely pass on the costs to the Government in future contract negotiations. Similarly, we held that state law may govern the circumstances under which stolen federal bonds can be recovered, notwithstanding Parnell's argument that "the value of bonds to the first purchaser and hence their salability by the Government would be materially affected." Brief for Respondent Parnell in Bank of America Nat'l Trust & Sav. Assn. v Parnell, OT 1956, No. 21, pp 10-11. As in each of the cases declining to extend the traditional reach of federal law of contracts beyond the rights and duties of the Federal Government, "any federal interest in the outcome of the question before us 'is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.' " Miree, 433 US, at 32-33, 53 L Ed 2d 557, 97 S Ct 2490, quoting Parnell 352 US, at 33-34, 1 L Ed 2d 93, 77 S Ct 119.

B

Our "uniquely federal interest" in the tort liability of affiliates of the Federal Government is equally narrow. The immunity we have recognized has extended no further than a subset of "officials of the Federal Government" and has covered only "discretionary" functions within the scope of their legal authority. See, e.g., Westfall v Erwin, 484 US 292, 98 L Ed 2d 619, 108 S Ct 580 (1988); Howard v Lyons, 360 US 593, 3 L Ed 2d 1454, 79 S Ct 1331 (1959); Barr v Matteo, 360 US 564, 571, 3 L Ed 2d 1434, 79 S Ct

1395 (1959) (plurality); Yaselli v Goff, 12 F2d 396 (CA2 1926), aff'd 276 US 503, 72 L Ed 395, 48 S Ct 155 (1927) (per curiam); Spalding v Vilas, 161 US 483, 40 L Ed 780, 16 S Ct 631 (1896). Never before

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have we so much as intimated that the immunity (or the "uniquely federal interest" that justifies it) might extend beyond that narrow class to cover also nongovernment employees whose authority to act is independent of any source of federal law and that are as far removed from the "functioning of the Federal Government" as is a Government contractor, Howard, supra, at 597, 3 L Ed 2d 1454, 79 S Ct 1331.

The historical narrowness of the federal interest and the immunity is hardly accidental. A federal officer exercises statutory authority, which not only provides the necessary basis for the immunity in positive law, but also permits us confidently to presume that interference with the exercise of discretion undermines congressional will. In contrast, a Government contractor acts independently of any congressional enactment. Thus, immunity for a contractor lacks both the positive law basis and the presumption that it furthers congressional will.

Moreover, even within the category of congressionally authorized tasks, we have deliberately restricted the scope of immunity to circumstances in which "the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens," Doe v McMillan, 412 US 306, 320, 36 L Ed 2d 912, 93 S Ct 2018 (1973); see Barr, supra, at 572-573, 3 L Ed 2d 1434, 79 S Ct 1935, because immunity "contravenes the basic tenet that individuals be held accountable for their wrongful conduct," Westfall, supra, at 295, 98 L Ed 2d 619, 108 S Ct 580. The extension of immunity to Government contractors

skews the balance we have historically struck. On the one hand, whatever marginal effect contractor immunity might have on the "effective administration of policies of government," its "harm to individual citizens" is more severe than in the Government-employee context. Our observation that "there are . . . other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner," Barr, 360 US, at 576, 3 L Ed 2d 1434, 79 S Ct 1335; see also id., at 571, 3 L Ed 2d 1434, 79 S Ct 1335, offers little deterrence to the Government contractor. On the other hand, a grant of immunity to Government

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contractors could not advance "the fearless, vigorous, and effective administration of policies of government" nearly as much as does the current immunity for Government employees. Ibid. In the first place, the threat of a tort suit is less likely to influence the conduct of an industrial giant than that of a lone civil servant, particularly since the work of a civil servant is significantly less profitable, and significantly more likely to be the subject of a vindictive lawsuit. In fact, were we to take seriously the Court's assertion that contractors pass their costs — including presumably litigation costs — through, "substantially if not totally, to the United States," ante, at 511, 101 L Ed 2d, at 457, the threat of a tort suit should have only marginal impact on the conduct of Government contractors. More importantly, inhibition of the government official who actually sets Government policy presents a greater threat to the "administration of policies of government," than does inhibition of a private contractor, whose role is devoted largely to assessing the technological feasibility and cost of satisfying the Government's predetermined needs. Similarly, unlike tort suits against Government officials, tort suits against Government contractors would rarely "consume time and energies" that "would

otherwise be devoted to governmental service." 360 US, at 571, 3 L Ed 2d 1434, 79 S Ct 1935.

In short, because the essential justifications for official immunity do not support an extension to the Government contractor, it is no surprise that we have never extended it that far.

C

Yearsley v W.A. Ross Construction Co. 309 US 18, 84 L Ed 554, 60 S Ct 413 (1940), the sole case cited by the Court immunizing a government contractor, is a slender reed on which to base so drastic a departure from precedent. In Yearsley we barred the suit of landowners against a private Government contractor alleging that its construction of a dam eroded their land without just compensation in violation of the Takings Clause of the Fifth Amendment. We relied in part on the observation that the plaintiffs failed to state a Fifth Amendment claim

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(since just compensation had never been requested, much less denied) and at any rate the cause of action lay against the Government, not the contractor. See id., at 21, 84 L Ed 554, 60 S Ct 413 ("[T]he Government has impliedly promised to pay [the plaintiffs] compensation and has afforded a remedy for its recovery by a suit in the Court of Claims") (citations omitted). It is therefore unlikely that the Court intended Yearsley to extend anywhere beyond the takings context, and we have never applied it elsewhere.

Even if Yearsley were applicable beyond the unique context in which it arose, it would have little relevance here. The contractor's work "was done pursuant to a contract with the United States Government, and under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States . . . as authorized by an Act

of Congress." Id., at 19, 84 L Ed 554, 60 S Ct 413. See also W.A. Ross Construction Co. v Yearsley, 103 F2d 589, 591 (CAB 1939) (undisputed allegation that contractor implemented "stabilized bank lines as set and defined by the Government Engineers in charge of this work for the Government"). In other words, unlike respondent here, the contractor in Yearsley was following, not formulating, the Government's specifications, and (so far as is relevant here) followed them correctly. Had respondent merely manufactured the CH-53D helicopter, following minutely the government's own in-house specifications, it would be analogous to the contractor in Yearsley, although still not analytically identical since Yearsley depended upon an actual agency relationship with the Government, see 309 US, at 22, 84 L Ed 554, 60 S Ct 419 ("The action of the agent is 'the act of the government' ") (citation omitted), which plainly was never established here. See, e.g., Bynum v FMC Corp. 770 F2d 556, 564 (CA5 1985). Cf. United States v New Mexico, 455 US 720, 785, 71 L Ed 2d 580, 102 S Ct 1378 (1982). But respondent's participation in the helicopter's design distinguishes this case from Yearsley, which has never been read to immunize the discretionary acts of those who perform service contracts for the Government.

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III

In a valiant attempt to bridge the analytical canyon between what Yearsley said and what the Court wishes it had said, the Court invokes the discretionary function exception of the Federal Tort Claims Act (FTCA), 28 USC § 2680(a) [28 USCS § 2680(a)]. The Court does not suggest that the exception has any direct bearing here, for petitioner has sued a private manufacturer (not the Federal Government) under Virginia law (not the FTCA). Perhaps that is why respondent has three times disavowed any

reliance on the discretionary function exception, even after coaching by the Court[4] as has the Government.[5]

[487 US 527]

Notwithstanding these disclaimers, the Court invokes the exception, reasoning that federal common law must immunize Government contractors from state tort law to prevent erosion of the discretionary function exception's *policy* of foreclosing judicial " 'second-guessing' " of discretionary governmental decisions. Ante, at 511, 101 L Ed 2d, at 457, quoting United States v Varig Airlines, 467 US 797,

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[4] "QUESTION: [Would it be] a proper judicial function to erect the contours of the military contractor's defense . . . even if there were no discretionary function exemption in the Federal Tort Claims Act?

"MR. LACOVARA: I think, yes . . . [I]t ought not to make a difference to the contractor, or to the courts, I would submit, whether or not the Government has a discretionary function exception under the Federal Tort Claims Act. . .

"QUESTION: I think your position would be the same if Congress had never waived its sovereign immunity in the Federal Tort Claims Act. . .

"MR. LACOVARA: That's correct. . .

"QUESTION: Now wait. I really don't understand that. It seems to me you can make the argument that there should be preemption if Congress wanted it, but how are we to perceive that's what Congress wanted if in the Tort Claims Act, Congress had said the Government itself should be liable for an ill designed helicopter? Why would we have any reason to think that Congress wanted to preempt liability of a private contractor for an ill designed helicopter?

"QUESTION: . . . [Y]our preemption argument, I want to be sure I understand it — does not depend at all on the Federal Tort Claims Act, as I understand it. . .

"MR. LACOVARA: That's correct." Tr of Oral Arg 33-35 (reargument Apr. 27, 1988).

[5] "QUESTION: Does the Government's position depend at all on the discretionary function exemption in the Federal Tort Claims Act?

"MR. AYER: Well, that's a hard question to answer . . . I think my answer to you is, no, ultimately it should not." Id., at 40-41.

814, 81 L Ed 2d 660, 104 S Ct 2755 (1984). The erosion the Court fears apparently is rooted not in a concern that suits against Government contractors will prevent them from designing, or the Government from commissioning the design of, precisely the product the Government wants, but in the concern that such suits might preclude the Government from purchasing the desired product at the price it wants: "The financial burden of judgments against the contractors," the Court fears, "would ultimately be passed through, substantially if not totally, to the United States itself." Ante, at 511, 101 L Ed 2d, at 457.

Even granting the Court's factual premise, which is by no means self-evident, the Court cites no authority for the proposition that burdens imposed on Government contractors, but passed on to the Government, burden the Government in a way that justifies extension of its immunity. However substantial such indirect burdens may be, we have held in other contexts that they are legally irrelevant. See, e.g., South Carolina v Baker, 485 US 505, 521, 99 L Ed 2d 592, 108 S Ct 1355 (1988) (our cases have "completely foreclosed any claim that the nondiscriminatory imposition of costs on private entities that pass them on to ... the Federal Government unconstitutionally burdens ... federal functions").

Moreover, the statutory basis on which the Court's rule of federal common law totters is more unstable than any we have ever adopted. In the first place, we rejected an analytically similar attempt to construct federal common law out of the FTCA when we held that the Government's waiver

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of sovereign immunity for the torts of its employees does not give the Government an implied right of indemnity from them, even though the "[t]he financial burden placed on the United States by the Tort Claims Act [could conceiva-

bly be] so great that government employees should be required to carry part of the burden." United States v Gilman, 347 US 507, 510, 98 L Ed 898, 74 S Ct 695 (1954). So too here, the FTCA's retention of sovereign immunity for the Government's discretionary acts does not imply a defense for the benefit of contractors who participate in those acts, even though they might pass on the financial burden to the United States. In either case, the most that can be said is that the position "asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position." Id., at 511, 98 L Ed 898, 74 S Ct 695 (footnote omitted).

Here, even that much is an overstatement, for the Government's immunity for discretionary functions is not even "a product of" the FTCA. Before Congress enacted the FTCA (when sovereign immunity barred any tort suit against the Federal Government) we perceived no need for a rule of federal common law to reinforce the Government's immunity by shielding also parties who might contractually pass costs on to it. Nor did we (or any other court of which I am aware) identify a special category of "discretionary" functions for which sovereign immunity was so crucial that a Government contractor who exercised discretion should share the Government's immunity from state tort law.[6]

Now, as before the FTCA's enactment, the Federal Government is immune from "[a]ny claim . . . based upon the exercise or performance [of] a discretionary function," including presumably any claim that petitioner might have brought against the Federal Government based upon respondent's negligent design of the helicopter in which Lt. Boyle died.

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[6] Some States, of course, would not have permitted a stranger to the contract to bring such a tort suit at all, but no one suggested that this rule of state tort law was compelled by federal law.

There is no more reason for federal common law to shield contractors now that the Government is liable for some torts than there was when the Government was liable for none. The discretionary function exception does not support an immunity for the discretionary acts of Government contractors any more than the exception for "[a]ny claim [against the Government] arising out of assault," § 2680(h), supports a personal immunity for Government employees who commit assaults. Cf. Sheridan v United States, 487 US 392, 400, 101 L Ed 2d 352, 108 S Ct 2449 (1988). In short, while the Court purports to divine whether Congress would object to this suit, it inexplicably begins and ends its sortilege with an exception to a statute that is itself inapplicable and whose repeal would leave unchanged every relationship remotely relevant to the accident underlying this suit.

Far more indicative of Congress' views on the subject is the wrongful-death cause of action that Congress itself has provided under the Death on the High Seas Act (DOHSA), Act of Mar. 30, 1920, ch 111, § 1 et seq., 41 Stat 537, codified, at 46 USC App § 761 et seq. (1982 ed, Supp IV) [46 USCS Appx §§ 761 et seq.] — a cause of action that could have been asserted against United Technologies had Lt. Boyle's helicopter crashed a mere three miles further off the coast of Virginia Beach. It is beyond me how a state-law tort suit against the designer of a military helicopter could be said to present any conflict, much less a " 'significant conflict,' " with "federal interests ... in the context of Government procurement," ante, at 511, 101 L Ed 2d, at 457, when federal law itself would provide a tort suit, but no

(at least no explicit) Government-contractor defense,[7] against the same

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designer for an accident involving the same equipment. See Pet for Cert in Sikorsky Aircraft Division, United Technologies Corp. v Kloss, OT 1987, No. 87-1633, pp 3-6 (trial court holds that family of marine can bring a wrongful-death cause of action under the DOHSA against United Technologies for the negligent design of a United States Marine Corps CH-53D helicopter in which he was killed when it crashed 21 miles offshore), cert denied, 486 US 1008, 100 L Ed 2d 200, 108 S Ct 1736 (1988).

IV

At bottom, the Court's analysis is premised on the proposition that any tort liability indirectly absorbed by the Government so burdens governmental functions as to compel us to act when Congress has not. That proposition is by no means uncontroversial. The tort system is premised on the assumption that the imposition of liability encourages actors to prevent any injury whose expected cost exceeds the cost of prevention. If the system is working as it should, Government contractors will design equipment to avoid certain injuries (like the deaths of soldiers or Government employees), which would be certain to burden the Government. The Court therefore has no basis for its assumption

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[7] But cf. Tozer v LTV Corp. 792 F2d 403 (CA4 1986) (applying defense in DOHSA case), cert pending, No. 86-674; Shaw v Grumman Aerospace Corp. 778 F2d 736 (CA11 1985) (same), cert pending, No. 85-1629; Koutsoubos v Boeing Vertal, Division of Boeing Co. 755 F2d 352 (CA3) (same), cert denied, 474 US 821, 88 L Ed 2d 59, 108 S Ct 72 (1985); McKay v Rockwell Int'l Corp. 704 F2d 444 (CA9 1983) (same), cert denied, 484 US 1043, 79 L Ed 2d 175, 104 S Ct 711 (1984).

that tort liability will result in a net burden on the Government (let alone a clearly excessive net burden) rather than a net gain.

Perhaps tort liability is an inefficient means of ensuring the quality of design efforts, but "[w]hatever the merits of the policy" the Court wishes to implement, "its conversion into law is a proper subject for congressional action, not for any creative power of ours." Standard Oil, 332 US, at 314-315, 91 L Ed 2067, 67 S Ct 1604. It is, after all, "Congress, not this Court or the other federal courts, [that] is the custodian of the national purse. By the same token [Congress] is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, securing the treasury or the Government against financial losses *however inflicted* . . . ." Ibid. (emphasis added). See also Gilman, supra,

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at 510-512, 98 L Ed 898, 74 S Ct 695. If Congress shared the Court's assumptions and conclusion it could readily enact "A BILL [t]o place limitations on the civil liability of government contractors to ensure that such liability does not impede the ability of the United States to procure necessary goods and services," HR 4765, 99th Cong, 2d Sess (1986); see also S 2441, 99th Cong, 2d Sess (1986). It has not.

Were I a legislator, I would probably vote against any law absolving multibillion dollar private enterprises from answering for their tragic mistakes, at least if that law were justified by no more than the unsupported speculation that their liability might ultimately burden the United States Treasury. Some of my colleagues here would evidently vote otherwise (as they have here), but that should not matter here. We are judges not legislators, and the vote is not ours to cast.

I respectfully dissent.

Justice Stevens, dissenting.

When judges are asked to embark on a lawmaking venture, I believe they should carefully consider whether they, or a legislative body, are better equipped to perform the task at hand. There are instances of so-called interstitial lawmaking that inevitably become part of the judicial process.[1] But when we are asked to create an entirely new doctrine — to answer "questions of policy on which Congress has not spoken," United States v Gilman, 347 US 507, 511, 98 L Ed 898, 74 S Ct 695 (1954) — we have a special duty to identify the proper decisionmaker before trying to make the proper decision.

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When the novel question of policy involves a balancing of the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual — whether in the social welfare context, the civil service context, or the military procurement context — I feel very deeply that we should defer to the expertise of the Congress. That is the central message of the unanimous decision in Bush v Lucas, 462 US 367, 76 L Ed 2d 648, 103 S Ct 2404 (1983);[2] that is why I joined the majority in Schweiker v Chilicky, ante, p 412, 101 L Ed 2d

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[1] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here en bloc." Southern Pacific Co. v Jensen, 244 US 205, 221, 61 L Ed 1086, 37 S Ct 524 (1917) (Holmes, J., dissenting).

[2] "[W]e decline to create a new substantive legal liability without legislative aid and as at the common law, because we are convinced that Congress is in a better position to decide whether or not the public

370, 108 S Ct 2460,[3] a case decided only three days ago; and that is why I am so distressed by the majority's decision today. For in this case, as in United States v Gilman, supra: "The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them." Id., at 511-513, 98 L Ed 898, 74 S Ct 695.

I respectfully dissent.

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interest would be served by creating it." 462 US, at 390, 76 L Ed 2d 648, 103 S Ct 2404 (internal quotation omitted).

[3] "Congressional competence at 'balancing governmental efficiency and the rights of [individuals],' Bush, 462 US, at 369 [76 L Ed 2d 648, 103 S Ct 2404], is no more questionable in the social welfare context than it is in the civil service context. Cf. Forrester v White, 484 US 219, 223-224 [96 L Ed 2d 666, 108 S Ct 538] (1988). Ante, at 425, 101 L Ed 2d 370, 108 S Ct 2460.

APPENDIX 3

SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
MINUTES — TRIAL BY JURY

DATE: May 19, 1992 DEPARTMENT: 19

MARVARD CASEY,
ROBERT GAYLORD,
Plaintiffs,

vs.

ABEX CORPORATION, et al.,
Defendants.

BRAYTON GROUP #20
JOHNSON CONSOLIDATION
CASE NO. 906 436
CASE NO. 891 562

JURY TRIAL
PERSONAL INJURY
ASBESTOS EXPOSURE
16th day

Present:

Judge: Laurence D. Kay
Reporter: Laurie Warner
Clerk: David Swanson
Bailiff: John Kaczmarczyk

Appearing for Plaintiffs:

Phillip A. Harley
Judy D. Jonas
BRAYTON & ASSOCIATES
(415) 898-1555

Appearing for Defendants:

For Kaiser Gypsum/Kaiser Cement
Peter Gilbert
BERRY & BERRY
(510) 835-8330

For B.P. Chemicals Inc.:
Jeffery J. Fadeff
KENNEY, BURD KNUTSON, & MARKOWITZ
(415) 397-3100

For Kaiser Cement/Kaiser Gypsum:
Frederick W. Gatt
KINCAID, GIANUNZIO, CAUDLE & HUBERT
(415) 465-5212

Subsequent to a recess heretofore called, the trial by jury was resumed this day.

At 9:12 a.m. all parties were present as heretofore and the court informed the jury of anticipated scheduling.

At 9:14 a.m. the jury retired to resume deliberations.

At 4:20 p.m. the jury returns to the courtroom with verdicts.

The jury found in favor of the Plaintiffs as follows:

For Marvard Casey:

1. Injury was legally caused by exposure to asbestos.

2A. Evidence was not sufficient to permit the jury to reasonably apportion the cause of Marvard Casey's lung cancer.

3. Marvard Casey would need future medical surveillance as a result of his past exposure to asbestos.

3A. & 4. The jury awarded Marvard Casey a total award of $335,000.00.

5. The jury awarded for Leona Casey's loss of consortium $150,000.00.

The court polled the jury and the vote was as follows:

Question No. 1 - 10 YES and 2 NO
Question No. 2A - 12 YES
Question No. 3A - 10 YES and 2 NO
Question No. 3B - 12 YES
Question No. 4 - 9 YES and 3 NO
Question No. 5 - 9 YES and 3 NO

For Robert Gaylord:

1. Injury was legally caused by exposure to asbestos.

2. Evidence was not sufficient to permit the jury to reasonably apportion the cause of Robert Gaylord's lung cancer.

3. Robert Gaylord would need future medical surveillance as a result of his past exposure to asbestos.

4. The jury awarded Robert Gaylord a total award of $1,304,000.00.

5. The jury awarded for Janet Gaylord's loss of consortium $200,000.00.

The court polled the jury and the vote was as follows:

Question No. 1 - 11 YES and 1 NO
Question No. 2A - 11 YES and 1 NO
Question No. 3A - 10 YES and 2 NO
Question No. 3B - 12 YES
Question No. 4 - 10 YES and 2 NO
Question No. 5 - 10 YES and 2 NO

A copy of the verdict is attached and made a part of these minutes.

At 4:20 p.m. the court admonished the jury and ordered it to recess it until June 1, 1992 at 9:30 a.m.

SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
MINUTES — TRIAL BY JURY

DATE: June 23, 1992 DEPARTMENT: 19

MARVARD CASEY,
ROBERT GAYLORD,

Plaintiffs,

vs.

ABEX CORPORATION, and
B. P. CHEMICALS, et al.,

Defendants.

BRAYTON GROUP #20
JOHNSON CONSOLIDATION
CASE NO. 906 436
CASE NO. 891 562

JURY TRIAL
PERSONAL INJURY
ASBESTOS EXPOSURE
Phase II, 5th day

Present:

Judge: Laurence D. Kay
Reporter: Laurie Warner
Clerk: David Swanson
Bailiff: No Bailiff

Appearing for Plaintiffs:

Judy D. Jonas
BRAYTON & ASSOCIATES
(415) 898-1555

Appearing for Defendants:

Jeffery J. Fadeff
KENNEY, BURD
KNUTSON,
& MARKOWITZ
(415) 397-3100

Subsequent to a recess heretofore called the trial by jury was resumed this day for phase II.

At 9:30 a.m. the court and counsel met in chambers off of the record and out of the presence of the jury.

At 11:13 a.m. with respective counsel present, the court heard motions made by each respective party.

Plaintiff's motion for punative damages was argued, submitted and denied.

Defendant's motion for directed verdict was argued, submitted and denied.

Plaintiff's motion for directed verdict was argued, submitted and denied.

Court rules that the "military contractor defense" does not apply.

Plaintiff's motion to exclude evidence and motion in regard to superceding cause was argued, submitted and denied.

At 12:05 p.m. the court ordered a recess until 1:30 p.m. and indicated that the court and respective counsel would discuss off of the record proposed jury instructions after lunch.

At 4:30 p.m. the court recessed until June 24, 1992 at 9:30 a.m.

SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
MINUTES — TRIAL BY JURY

DATE: June 24, 1992 DEPARTMENT: 19

MARVARD CASEY,
ROBERT GAYLORD,

Plaintiffs,

vs.

ABEX CORPORATION, and
B. P. Chemicals, et al.,

Defendants.

BRAYTON GROUP #20
JOHNSON CONSOLIDATION
CASE NO. 906 436
CASE NO. 891 562

JURY TRIAL
PERSONAL INJURY
ASBESTOS EXPOSURE
Phase II, 6th day

Present:

Judge: Laurence D. Kay
Reporter: Laurie Warner

Clerk: David Swanson
Bailiff: No Bailiff

Appearing for Plaintiffs:

Judy D. Jonas
BRAYTON & ASSOCIATES
(415) 898-1555

Appearing for Defendants:

Jeffery J. Fadeff
KENNEY, BURD
KNUTSON,
& MARKOWITZ
(415) 397-3100

Subsequent to a recess heretofore called the trial by jury was resumed this day for phase II.

At 9:30 a.m. the court and counsel met in chambers on the record and out of the presence of the jury.

At 9:50 a.m. all parties were present as heretofore and Defendants exhibits numbers 2, AA and RR were admitted into evidence.

At 9:52 a.m. Judy D. Jonas, counsel for the Plaintiff presented closing statement.

At 10:53 a.m. Jeffery J. Fadeff, counsel for the Defendant presented a closing statement.

At 11:46 a.m. Judy D. Jonas, counsel for the Plaintiff presented rebuttal.

Plaintiff's motion to exclude evidence and motion in regard to superceding cause was argued, submitted and denied.

At 12:00 noon the court ordered a recess until 1:30 p.m.

At 1:30 p.m. the court instructed the jury in matters of law.

At 2:10 p.m. the clerk swore the bailiff to take charge of the jury and the jury retired to commence deliberations.

At 4:30 p.m. the jury returns to the courtroom with a verdict.

A copy of the verdict is attached and made a part of these minutes.

The court polls the jury.

The jury voted as follows:

Question 1A(1): 12 YES
Question 1A(2): 12 YES
Question 1B: 12 YES

Question 2: 12 YES
Question 3: 12 YES
Question 4A: 10 YES, 2 NO
Question 4B: 12 YES
Question 5A: 9 YES, 3 NO
Question 5B: 9 YES, 3 NO
Question 6: 9 YES, 3 NO

The court ordered the verdict to be recorded.

The jury is thanked and excused.

APPENDIX 4

ALAN R. BRAYTON, ESQ.
McQUAID, BEDFORD, BRAYTON,
CLAUSEN & GRELL
Attorneys at Law
999 Grant Avenue
P.O. Box 2109
Novato, California 94948
(415) 898-1555

Attorneys For Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

ROBERT GAYLORD and
JANET GAYLORD,

Plaintiffs,

v.

ABEX CORPORATION; ACandS, INC.; AMERICAN ASBESTOS COMPANY; AMERICAN MOTORS CORPORATION; AMOSA (PTY), LTD.; THE ANCHOR PACKING COMPANY; A.P. GREEN REFACTORIES, INC.; ARMCO, INC.; ARMSTRONG WORLD INDUSTRIES, INC.; ASARCO INCORPORATED; ASSOCIATED MINERAL CORPORATION, AG; ATLAS ASBESTOS COMPANY, LTD.; ATLAS-TURNER, INC.; ATLAS-TURNER COMPANY, LTD.; BABCOCK & WILCOX COMPANY; BEADEX MANUFACTURING, INC.; BELL ASBESTOS MINES, LTD.; THE BENDIX CORPORATION; BES-TEX, INC.; BIGELOW-LIPTAK CORPORATION; BLUE DIAMOND CORPORATION; BORG-WARNER CORPORATION; BOTSWANA FIBERS, LTD.; BROWER COMPANY/BROWER CONSTRUCTION; BURLINGTON INDUSTRIES, INC.; CAPASO, LTD.; CAPE ASBESTOS FIBERS, LTD.; CAPE BLUE MINES (PTY), LTD.; CAPE INDUSTRIES, PLC; CAPE INDUSTRIES OVERSEAS LTD.; CAREY CANADA, INC.; CARLISLE CORPORATION; CASSIAR ASBESTOS COMPANY, LTD.; THE CELOTEX CORPORATION; CENTRAL MINING FINANCE, LTD.; CERTAIN-TEED CORPORATION; CHARTER CONSOLIDATED, LTD.; CHARTER CONSOLIDATED, PLC; COMMODATA (PTY), LTD.; CORK MANUFACTURING COMPANY; CRANE PACKING CO.; CHRYSLER CORPORATION; COMBUSTION ENGINEERING, INC.; DEVCON CORPORATION; M.H. DETRICK CO; E.J. BARTELLS CO.; EAGLE-PICHER INDUSTRIES, INC.; EAST BAY GASKET, INC.; EGNEP (PTY), LTD.; ESSEX GROUP, INC.;

NO: 891562

COMPLAINT FOR PERSONAL INJURY AND LOSS OF CONSORTIUM

EXCELSIOR, INC.; FIBREBOARD CORPORATION; FIBREX, INC.; FIRESTONE TIRE & RUBBER CORPORATION; FIRETARD (PTY), LTD.; FLEXITALLIC GASKET CO., INC.; FLINTKOTE COMPANY; FORD MOTOR COMPANY; FOSTER-WHEELER, INC.; GAF CORPORATION; GARLOCK, INC.; GASKET SPECIALTIES INC.; GENERAL DYNAMICS CORPORATION; GENERAL ELECTRIC COMPANY; GENERAL MOTORS CORPORATION; GENERAL VENEER MANUFACTURING COMPANY; GENSTAR COMPANY; GOODYEAR AEROSPACE CORPORATION; GOODYEAR TIRE AND RUBBER COMPANY; GROENWATER ASBESTOS MINING COMPANY (PTY), LTD.; HAMILTON DISTRIBUTING, INC.; HAMILTON MATERIALS, INC.; HAVELOCK ASBESTOS MINES (SWAZILAND), LTD.; H.K. PORTER COMPANY, INC.; HITCO; INTERNATIONAL ASBESTOS, LTD.; J.P. STEVENS & CO., INC.; JIM WALTER CORP.; JOHN CRANE-HOUDAILLE, INC.; KAISER ALUMINUM & CHEMICAL; KAISER CEMENT CORPORATION; KAISER GYPSUM COMPANY, INC.; KAISER STEEL CORPORATION; KEASBEY-MATTISON COMPANY; KEENE BUILDING PRODUCTS, INC.; KEENE CORPORATION; KELLY-MOORE PAINT COMPANY, INC.; LAKE ASBESTOS OF QUEBEC, LTD.; LEAR-SIEGLER, INC.; LOUISIANA PACIFIC; MacARTHUR COMPANY; MAREMONT CORPORATION; NASCO AVIATION CORPORATION; NATIONAL GYPSUM COMPANY; NAVISTAR INTERNATIONAL CORPORATION; NIANTIC RUBBER COMPANY; NORTON COMPANY; NUTURN CORPORATION; OWENS-CORNING FIBERGLAS CORPORATION; OWENS-ILLINOIS, INC.; PARKER-HANNIFIN CORP.; PITTSBURGH CORNING CORP.; PLANT INSULATION CO.; POWHATTAN MINING CO.; RAYMARK INDUSTRIES, INC.; RAYTECH CORPORATION; RAYBESTOS-MANHATTAN, INC.; RICH-TEX, INC.; ROOTPORT BLUE ASBESTOS (PTY), LTD.; SEPCO, INC.; SHABANI & MASHABA MINES (PVT), LTD.; SHAMROCK, INC.; SOUTHERN PACIFIC COMPANY; SOUTHERN TEXTILE CO.; STANDARD ASBESTOS MFG. AND INSULATION CO.; SUPRO CORPORATION; THE B.F. GOODRICH COMPANY; THE SYNKOLOID COMPANY; THIOKOL CORP.; TURNER & NEWALL, LTD.; TURNER & NEWALL HOLDINGS (PVY), LTD.; TURNER & NEWALL INDUSTRIES, INC.; TURNER & NEWALL INTERNATIONAL LTD.; TURNER ASBESTOS FIBERS, LTD.; TURNER-NEWALL PLC;

UNIROYAL, INC.; UNITED STATES GYPSUM COMPANY; UNITED STATES MINERAL PRODUCTS COMPANY; UNION CARBIDE CORPORATION; WAGNER ELECTRIC CORPORATION; WALDRON, DUFFY & SMITH; WESTERN MacARTHUR CO.; WORLD BESTOS CO.; W.R. GRACE & CO.; and FIRST DOE through ONE HUNDREDTH DOE, inclusive,

Defendants.

FIRST CAUSE OF ACTION — NEGLIGENCE
(Personal Injuries)

PLAINTIFF COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND FOR A CAUSE OF ACTION FOR NEGLIGENCE (PERSONAL INJURIES) ALLEGES:

1. The true names and capacities, whether individual, corporate, associate, governmental or otherwise, of defendants FIRST DOE through ONE HUNDREDTH DOE, inclusive, are unknown to plaintiff at this time, who therefore sues said defendants by such fictitious names. When the true names and capacities of said defendants have been ascertained, plaintiff will amend this complaint accordingly. Plaintiff is informed and believes, and thereon alleges, that each defendant designated herein as a DOE is responsible, negligently or in some other actionable manner, for the events and happenings hereinafter referred to, and caused injuries and damages proximately thereby to the plaintiff, as hereinafter alleged.

2. At all times herein mentioned, each of the defendants was the agent, servant, employee and/or joint venturer of his co-defendants, and each of them, and at all said times, each defendant was acting in the full course and scope of said agency, service, employment and/or joint venture.

3. Plaintiff is informed and believes, and thereon alleges that at all times herein mentioned, defendants ABEX CORPORATION; ACandS, INC.; AMERICAN ASBESTOS COMPANY; AMERICAN MOTORS CORPORATION; AMOSA (PTY), LTD.; THE ANCHOR PACKING COMPANY; A.P. GREEN REFACTORIES, INC.; ARMCO, INC.; ARMSTRONG WORLD INDUSTRIES, INC.; ASARCO INCORPORATED; ASSOCIATED MINERAL CORPORATION, AG; ATLAS ASBESTOS COMPANY, LTD.; ATLAS-TURNER,

INC.; ATLAS-TURNER COMPANY, LTD.; BABCOCK & WILCOX COMPANY; BEADEX MANUFACTURING, INC.; BELL ASBESTOS MINES, LTD.; THE BENDIX CORPORATION; BES-TEX, INC.; BIGELOW-LIPTAK CORPORATION; BLUE DIAMOND CORPORATION; BORG-WARNER CORPORATION; BOTSWANA FIBERS, LTD.; BROWER COMPANY/BROWER CONSTRUCTION; BURLINGTON INDUSTRIES, INC.; CAPASO, LTD.; CAPE ASBESTOS FIBERS, LTD.; CAPE BLUE MINES (PTY), LTD.; CAPE INDUSTRIES, PLC; CAPE INDUSTRIES OVERSEAS LTD.; CAREY CANADA, INC.; CARLISLE CORPORATION; CASSIAR ASBESTOS COMPANY, LTD.; THE CELOTEX CORPORATION; CENTRAL MINING FINANCE, LTD.; CERTAINTEED CORPORATION; CHARTER CONSOLIDATED, LTD.; CHARTER CONSOLIDATED, PLC; COMMODATA (PTY), LTD.; CORK MANUFACTURING COMPANY; CRANE PACKING CO.; CHRYSLER CORPORATION; COMBUSTION ENGINEERING, INC.; DEVCON CORPORATION; M.H. DETRICK CO; E.J. BARTELLS CO.; EAGLE-PICHER INDUSTRIES, INC.; EAST BAY GASKET, INC.; EGNEP (PTY), LTD.; ESSEX GROUP, INC.; EXCELSIOR, INC.; FIBREBOARD CORPORATION; FIBREX, INC.; FIRESTONE TIRE & RUBBER CORPORATION; FIRETARD (PTY), LTD.; FLEXITALLIC GASKET CO., INC.; FLINTKOTE COMPANY; FORD MOTOR COMPANY; FOSTER-WHEELER, INC.; GAF CORPORATION; GARLOCK, INC.; GASKET SPECIALTIES, INC.; GENERAL DYNAMICS CORPORATION; GENERAL ELECTRIC COMPANY; GENERAL MOTORS CORPORATION; GENERAL VENEER MANUFACTURING COMPANY; GENSTAR COMPANY; GOODYEAR AEROSPACE CORPORATION; GOODYEAR TIRE AND RUBBER

COMPANY; GROENWATER ASBESTOS MINING COMPANY (PTY), LTD.; HAMILTON DISTRIBUTING, INC.; HAMILTON MATERIALS, INC.; HAVELOCK ASBESTOS MINES (SWAZILAND), LTD.; H.K. PORTER COMPANY, INC.; HITCO; INTERNATIONAL ASBESTOS, LTD.; J.P. STEVENS & CO., INC.; JIM WALTER CORP.; JOHN CRANE-HOUDAILLE, INC.; KAISER ALUMINUM & CHEMICAL; KAISER CEMENT CORPORATION; KAISER GYPSUM COMPANY, INC.; KAISER STEEL CORPORATION; KEASBEY-MATTISON COMPANY; KEENE BUILDING PRODUCTS, INC.; KEENE CORPORATION; KELLY-MOORE PAINT COMPANY, INC.; LAKE ASBESTOS OF QUEBEC, LTD.; LEAR-SIEGLER, INC.; LOUISIANA PACIFIC, MacARTHUR COMPANY; MAREMONT CORPORATION; NASCO AVIATION CORPORATION; NATIONAL GYPSUM COMPANY; NAVISTAR INTERNATIONAL CORPORATION; NIANTIC RUBBER COMPANY; NORTON COMPANY; NUTURN CORPORATION; OWENS-CORNING FIBERGLAS CORPORATION; OWENS-ILLINOIS, INC.; PARKER-HANNIFIN CORP.; PITTSBURGH CORNING CORP.; PLANT INSULATION CO.; POWHATTAN MINING CO.; RAYMARK INDUSTRIES, INC.; RAYTECH CORPORATION; RAYBESTOS-MANHATTAN, INC.; RICH-TEX, INC.; ROOTPORT BLUE ASBESTOS (PTY), LTD.; SEPCO, INC.; SHABANI & MASHABA MINES (PVT), LTD.; SHAMROCK, INC.; SOUTHERN PACIFIC COMPANY; SOUTHERN TEXTILE CO.; STANDARD ASBESTOS MFG. AND INSULATION CO.; SUPRO CORPORATION; THE B.F. GOODRICH COMPANY; THE SYNKOLOID COMPANY; THIOKOL CORP.; TURNER & NEWALL, LTD.; TURNER & NEWALL HOLDINGS (PVY), LTD.; TURNER & NEWALL INDUSTRIES,

INC.; TURNER & NEWALL INTERNATIONAL, LTD.; TURNER ASBESTOS FIBERS, LTD.; TURNER-NEWALL, PLC; UNIROYAL, INC.; UNITED STATES GYPSUM COMPANY; UNITED STATES MINERAL PRODUCTS COMPANY; UNION CARBIDE CORPORATION; WAGNER ELECTRIC CORPORATION; WALDRON, DUFFY & SMITH; WESTERN MacARTHUR CO.; WORLD BESTOS CO.; W.R. GRACE & CO.; and FIRST DOE through ONE HUNDREDTH DOE, inclusive, were and are corporations organized and existing under and by virtue of the laws of the State of California, or the laws of some other state or foreign jurisdiction, and that said defendants, and each of them, were and are authorized to do and are doing business in the State of California, and that said defendants have regularly conducted business in the Counties of San Francisco, Solano and Alameda, State of California.

4. At all times herein mentioned, each of the defendants was the successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, subsidiary, wholly or partially owned by, or the whole or partial owner of or member in an entity researching, studying, manufacturing, fabricating, designing, labeling, assembling, distributing, leasing, buying, offering for sale, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising a certain substance, the generic name of which is asbestos, and other products containing said substance. Said entities shall hereinafter collectively be called "alternate entities." Each of the herein named defendants are liable for the tortious conduct of each successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, subsidiary, whole or partial

owner, or wholly or partially owned entity, or entity that it was a member of, or funded, that researched, studied, manufactured, fabricated, designed, labeled, assembled, distributed, leased, bought, offered for sale, sold, inspected, serviced, installed, contracted for installation, repaired, marketed, warranted, rebranded, manufactured for others and advertised a certain substance, the generic name of which is asbestos, and other products containing said substance. The following defendants, and each of them, are liable for the acts of each and every "alternate entity," and each of them, in that there has been a virtual destruction of plaintiff's remedy against each such "alternate entity"; defendants, and each of them, have acquired the assets, product line, or a portion thereof, of each such "alternate entity"; defendants, and each of them, have acquired the assets, product line, or a portion thereof, of each such "alternate entity"; defendants, and each of them caused the destruction of plaintiff's remedy against each such "alternate entity"; each such defendant has the ability to assume the risk-spreading role of each such "alternate entity"; and that each such defendant enjoys the goodwill originally attached to each such "alternate entity."

DEFENDANT	ALTERNATE ENTITY
ACandS, INC.	ARMSTRONG CORK CO. ARMSTRONG WORLD INDUSTRIES, INC. ARMSTRONG CONTRACTING & SUPPLY CORP.
ARMSTRONG WORLD INDUSTRIES, INC.	ARMSTRONG CORK CO. ARMSTRONG CONTRACTING & SUPPLY CORP.
ATLAS TURNER INC.	ATLAS ASBESTOS BELL ASBESTOS MINES, LTD. TURNER-NEWALL, PLC.
BELL ASBESTOS MINES, LTD.	ATLAS TURNER, INC. TURNER NEWALL, PLC.
THE BENDIX CORPORATION	ALLIED CORPORATION
CAPE INDUSTRIES, PLC	AMOSA (PTY), LTD. EGNEP (PTY), LTD. CAPE INDUSTRIES (OVERSEAS), LTD. CENTRAL MINING FINANCE, LTD. CAPE ASBESTOS FIBERS, LTD. CAPE BLUE MINES (PTY), LTD. GROENWATER ASBESTOS MINING COMPANY (PTY), LTD. ROOTPORT BLUE ASBESTOS (PTY), LTD. COMMODATA (PTY), LTD. FIRETARD (PTY), LTD. ASSOCIATED MINERAL ASSOCIATION, AG INTERNATIONAL ASBESTOS, LTD. BOTSWANA FIBERS, LTD.

DEFENDANT	ALTERNATE ENTITY
	NORTH AMERICAN ASBESTOS CORPORATION
	CAPASCO, LTD.
OVERSEAS, LTD.	NORTH AMERICAN ASBESTOS CORPORATION
CAREY CANADA, INC.	JIM WALTER CORP.
THE CELOTEX CORPORATION	JIM WALTER CORP.
	PANACON CORP.
	PHILIP CAREY MANUFACTURING CO.
	PHILIP CAREY MANUFACTURING CORP.
	PHILIP CAREY COMPANY
	GLEN ALDEN CORPORATION
	XPRU CORPORATION
	P.C. COMPANY, INC.
	BRIGGS MANUFACTURING COMPANY
CHARTER CONSOLIDATED, PLC	CAPE INDUSTRIES, PLC
	AMOSA (PTY), LTD.
	EGNEP (PTY), LTD.
	CAPE INDUSTRIES (OVERSEAS), LTD.
	CENTRAL MINING FINANCE, LTD.
	CAPE ASBESTOS FIBERS, LTD.
	GROENWATER ASBESTOS MINING COMPANY (PTY), LTD.
	ROOTPORT BLUE ASBESTOS (PTY), LTD.
	COMMODATA (PTY), LTD.
	FIRETARD (PTY), LTD.
	ASSOCIATED MINERAL ASSOCIATION, AG
	INTERNATIONAL ASBESTOS, LTD.

DEFENDANT	ALTERNATE ENTITY
	BOTSWANA FIBERS, LTD.
	NORTH AMERICAN ASBESTOS CORPORATION
	CAPASCO, LTD.
CRANE PACKING CO.	JOHN CRANE-HOUDAILLE, INC.
COMBUSTION ENGINEERING	THE SUPERHEATER CO.
	SEPCO INC.
EAGLE-PICHER INDUSTRIES, INC.	THE EAGLE-PICHER CO. INC.
	EAGLE-PICHER LEAD CO.
	CONSOLIDATED INDUSTRIAL EQUIPMENT COMPANY, INC.
FIBREBOARD CORPORATION	PLANT RUBBER AND ASBESTOS WORKS
	PABCO PRODUCTS, INC.
	THE PARAFFINE COMPANIES, INC.
FIBREX, INC.	FORTY-EIGHT INSULATIONS, INC.
FLINTKOTE COMPANY	FLINTKOTE MINES, LTD. — QUEBEC
GAF CORPORATION	RUBERROID CO.
GENSTAR COMPANY	FLINTKOTE COMPANY
	FLINTKOTE MINES, LTD. — QUEBEC
H.K. PORTER COMPANY, INC.	ASBESTOS MANUFACTURING CO.
	SOUTHERN ASBESTOS CO.
	THERMOID TEXTILE CO.
	THERMOID CO.
	SOUTHERN TEXTILE CORPORATION
JIM WALTER CORP.	THE CELOTEX CORPORATION
	PHILIP CAREY COMPANY
	PANACON CORP.

DEFENDANT	ALTERNATE ENTITY
JOHN CRANE-HOUDAILLE, INC.	CRANE PACKING CO.
KEASBEY-MATTISON COMPANY	CERTAINTEED PRODUCTS CORPORATION
	NICOLET, INC.
KEENE CORPORATION	THE EHRET MAGNESIA MANUFACTURING CO.
	BALDWIN HILL COMPANY
	BALDWIN EHRET HILL, INC.
	KEENE BUILDING PRODUCTS CORPORATION
LOUISIANA PACIFIC	FIBREBOARD CORPORATION
NATIONAL GYPSUM	NATIONAL ASBESTOS MINES, LTD.
	SMITH ASBESTOS PRODUCTS
	ASBESTOME CORP.
NAVISTAR INTERNATIONAL CORPORATION	INTERNATIONAL HARVESTER COMPANY
OWENS-CORNING FIBERGLAS	OWENS-ILLINOIS, INC.
	OWENS-ILLINOIS GLASS CO.
OWENS-ILLINOIS, INC.	OWENS-CORNING FIBERGLAS CORPORATION
	OWENS-ILLINOIS GLASS CO.
	AMERICAN STRUCTURAL PRODUCTS CO.
PARKER-HANNIFIN CORP.	SACOMO
	SACOMO SIERRA, INC.
PITTSBURGH-CORNING	UNARCO
RAYBESTOS-MANHATTAN, INC.	RAYMARK INDUSTRIES, INC.

DEFENDANT	ALTERNATE ENTITY
RAYMARK INDUSTRIES, INC.	RAYBESTOS-MANHATTAN, INC. THE RAYBESTOS CO. U.S. ASBESTOS CORP. GENERAL ASBESTOS & RUBBER MFG. CO. RAYTECH CORPORATION
TURNER-NEWALL, PLC	TURNER ASBESTOS FIBERS, LTD. TURNER & NEWAL INTERNATIONAL, LTD. HAVELOCK ASBESTOS MINES (SWAZILAND), LTD. SHABANI & MASHABA MINES (PVT), LTD. FLEXITALLIC GASKETT COMPANY, INC. NUTURN CORPORATION TURNER & NEWALL INDUSTRIES, INC. TURNER & NEWALL HOLDINGS (PTY), LTD. CORK MANUFACTURING COMPANY KEASBEY-MATTISON COMPANY CERTAINTEED PRODUCTS CORPORATION ATLAS-TURNER COMPANY, LTD. ATLAS ASBESTOS COMPANY, LTD. BELL ASBESTOS MINES, LTD. CASSIAR ASBESTOS COMPANY, LTD. KEASBEY & MATTISON, INC. NORTH AMERICAN ASBESTOS

DEFENDANT	ALTERNATE ENTITY
	ATLAS TURNER, INC.
	CONTINENTAL PRODUCTS CORP.
WESTERN ASBESTOS CO.	BAY CITIES ASBESTOS COMPANY
WESTERN MACARTHUR CO.	WESTERN ASBESTOS CO.
	MACARTHUR CO.
	BAY CITIES ASBESTOS COMPANY
MACARTHUR CO.	WESTERN MACARTHUR CO.
	WESTERN ASBESTOS CO.
	BAY CITIES ASBESTOS COMPANY

FIRST DOE through TENTH DOE is responsible for, and liable for the acts of ELEVENTH DOE through FIFTIETH DOE, inclusive. The defendants, their "alternate entities", and each of them, are corporations organized and existing under and by virtue of the laws of the State of California, or the laws of some other state or foreign jurisdiction, and said defendants, their "alternate entities", and each of them, were and are authorized to do and are doing business in the State of California, and said defendants, their "alternate entities", and each of them, have regularly conducted business in the Counties of San Francisco, Solano, and Alameda, State of California.

5. At all times herein mentioned, defendants, and each of them, were and are engaged in the business of researching, manufacturing, fabricating, designing, labeling, assembling, distributing, leasing, buying, offering for sale, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising a certain substance, the generic name of which is asbestos, and other products containing said substance.

6. At all times herein mentioned, defendants, and each of them, singularly and jointly, negligently and carelessly researched, manufactured, fabricated, designed, tested or failed to test, warned or failed to warn, labeled, assembled, distributed, leased, bought, offered for sale, sold, inspected, serviced, installed, contracted for installation, repaired, marketed, warranted, rebranded, manufactured for others, packaged and advertised, a certain substance, the generic name of which is asbestos, and other products containing said substance, in that said substance proximately caused personal injuries to users, consumers, workers, bystanders and others, including the Plaintiff herein, (hereinafter collectively called "exposed persons"), while being used in a manner that was reasonably foreseeable, thereby rendering said substances unsafe and dangerous for use by "exposed persons".

7. Defendants, their "alternate entities," and each of them, had a duty to exercise due care in the pursuance of the activities mentioned above and defendants, and each of them, breached said duty of due care.

8. Plaintiff has used, handled or been otherwise exposed to asbestos and asbestos-containing products referred to herein in a manner that was reasonably foreseeable. Plaintiff's exposure to asbestos and asbestos-containing products occurred at various locations as set forth in Exhibit "A", which is attached hereto and incorporated by reference herein.

9. As a direct and proximate result of the conduct of the defendants, their "alternate entities," and each of them, as aforesaid, plaintiff's exposure to asbestos and asbestos-containing products caused severe and permanent injury to the plaintiff, the nature of which, along with the date of plaintiff's diagnosis, are set forth in Exhibit "B", which is attached hereto and incorporated by reference herein.

10. Plaintiff is informed and believes, and thereon alleges, that progressive lung disease, cancer and other serious diseases are caused by inhalation of asbestos fibers without perceptible trauma and that said disease results from exposure to asbestos and asbestos-containing products over a period of time.

11. Plaintiff suffers from a condition related to exposure to asbestos and asbestos-containing products. Plaintiff was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease.

12. As a direct and proximate result of the aforesaid conduct of defendants, their "alternate entities," and each of them, plaintiff has suffered, and continues to suffer, permanent injuries and/or future increased risk of injuries to his person, body and health, including, but not limited to, asbestosis, other lung damage, and cancer, and the mental and emotional distress attendant thereto, all to his general damage in the sum in excess of the jurisdictional limits of the Municipal Court.

13. As a direct and proximate result of the aforesaid conduct of the defendants, their "alternate entities," and each of them, plaintiff has incurred, is presently incurring, and will incur in the future, liability for physicians, surgeons, nurses, hospital care, medicine, hospice, X-rays and other medical treatment, the true and exact amount thereof being unknown to plaintiff at this time, and plaintiff prays leave to amend this complaint accordingly when the true and exact cost thereof is ascertained.

14. As a further direct and proximate result of the said conduct of the defendants, their "alternate entities," and each of them, plaintiff has incurred, and will incur, loss of income, wages, profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature

and extent of which are not yet known to plaintiff; and leave is requested to amend this complaint to conform to proof at the time of trial.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as hereinafter set forth.

SECOND CAUSE OF ACTION — STRICT LIABILITY

AS AND FOR A SECOND, SEPARATE, FURTHER AND DISTINCT CAUSE OF ACTION FOR STRICT LIABILITY, PLAINTIFF COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

15. Plaintiff incorporates herein by reference, as though fully set forth herein, Paragraphs 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13 and 14 of the First Cause of Action herein.

16. Defendants, their "alternate entities", and each of them, researched, manufactured, fabricated, designed, tested or failed to test, labeled, assembled, distributed, leased, bought, offered for sale, sold, inspected, serviced, installed, contracted for installation, repaired, marketed, warranted, rebranded, manufactured for others, packaged and advertised a certain substance, the generic name of which is asbestos, and other products containing said substance.

17. Defendants, their "alternate entities", and each of them, knew and intended that the above referenced asbestos and other products containing asbestos would be used by the purchaser or user without inspection for defects therein or in any of its component parts and without knowledge of the hazards involved in such use.

18. Defendants, their "alternate entities" and each of them, knew, or should have known, and intended that the aforementioned asbestos and products containing asbestos would be used or handled as specified in Exhibit "C," which

is attached hereto and incorporated by reference herein, resulting in the release of airborne asbestos fibers that through such foreseeable use and/or handling "exposed persons" would use or be in proximity to and exposed to said asbestos fibers.

19. Said asbestos and products containing asbestos were defective and unsafe for their intended purpose in that the inhalation of asbestos fibers causes serious disease and/or death. The defect existed in the said products at the time they left the possession of defendants, their alternate entities, and each of them. Said products did, in fact, cause personal injuries, including asbestosis, other lung damage, and cancer to "exposed persons" while being used in a reasonably foreseeable manner, thereby rendering the same unsafe and dangerous for use.

20. "Exposed persons" did not know of the substantial danger of using said products. Said dangers were not readily recognizable by "exposed persons". Said defendants, their "alternate entities", and each of them, further failed to adequately warn of the risks to which plaintiff and others similarly situated were exposed.

21. Plaintiff alleges that the aforementioned defendants, their "alternate entities", and each of them impliedly warranted their asbestos and asbestos-containing products to be safe for their intended use but that their asbestos and asbestos-containing products created an unreasonable risk of bodily harm to exposed persons.

22. Plaintiff further alleges his injuries are a result of cumulative exposure to asbestos and various asbestos-containing products manufactured, fabricated, inadequately researched, designed, inadequately tested, labeled, assembled, distributed, leased, bought, offered for sale, sold, inspected, serviced, installed, contracted for installation, repaired, marketed, warranted, rebranded, manufactured for

others, packaged and advertised by the aforementioned defendants, their "alternate entities", and each of them and that plaintiff cannot identify precisely which asbestos or asbestos-containing product(s) caused the injuries complained of herein

23. The defendants, their "alternate entities", and each of them as named in plaintiff's complaint constitute a substantial share of the asbestos or asbestos-containing products market which caused plaintiff's injuries.

24. The aforementioned asbestos and asbestos-containing products were toxic and carcinogenic and were used in conjunction with one another, all resulting in cumulative injury and harm to the plaintiff herein. Plaintiff therefore alleges it is the burden of the defendants, their "alternate entities", and each of them, to prove the asbestos and asbestos-containing products manufactured by or asbestos or asbestos-containing products applied or distributed by them, were not the cause of plaintiff's injury in accordance with the holdings of *Sindell* v. *Abbott Laboratories* (1980) 26 Cal.3d 588 and *Pereira* v. *Dow Chemical Company, Inc.* (1982) 129 Cal.App.3d 865.

25. In researching, manufacturing, fabricating, designing, testing or failing to test, warning or failing to warn, labeling, assembling, distributing, leasing, buying, offering for sale, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising asbestos and asbestos-containing products, defendants, their "alternate entities", and each of them, did so with conscious disregard for the safety of "exposed persons" who came in contact with said asbestos and asbestos-containing products, in that said defendants, their "alternate entities", and each of them, had prior knowledge that there was a substantial risk of injury or death resulting from exposure to asbestos or asbestos-containing products, including, but not limited to,

asbestosis, other lung disabilities and cancer. Said knowledge was obtained, in part, from scientific studies performed by, at the request of, or with the assistance of, said defendants, their "alternate entities", and each of them, and which knowledge was obtained by said defendants, their "alternate entities", and each of them on or before 1930, and thereafter.

26. On or before 1930, and thereafter, said defendants, their "alternate entities" and each of them, were aware that members of the general public and other "exposed persons", who would come in contact with asbestos and asbestos-containing products, had no knowledge or information indicating that asbestos or asbestos-containing products could cause injury, and said defendants, their "alternate entities", and each of them, knew that members of the general public and other "exposed persons", who came in contact with asbestos and asbestos-containing products, would assume, and in fact did assume, that exposure to asbestos and asbestos-containing products was safe, when in fact said exposure was extremely hazardous to health and human life.

27. With said knowledge, said defendants, their "alternate entities", and each of them, opted to research, manufacture, fabricate, design, label, assemble, distribute, lease, buy, offer for sale, inspect, service, install, contract for installation, repair, market, warrant, rebrand, manufacture for others, package and advertise said asbestos and asbestos-containing products without attempting to protect "exposed persons" from or warn "exposed persons" of, the high risk of injury or death resulting from exposure to asbestos and asbestos-containing products. Rather than attempting to protect "exposed persons" from, or warn "exposed persons" of, the high risk of injury or death resulting from exposure to asbestos and asbestos-containing products, defendants, their "alternate entities", and each of them, intentionally failed to reveal their knowledge of said risk, and consciously and

actively concealed and suppressed said knowledge from "exposed persons" and members of the general public, thus impliedly representing to "exposed persons" and members of the general public that asbestos and asbestos-containing products were safe for all reasonably foreseeable uses. Defendants, their "alternate entities", and each of them, engaged in this conduct and made these implied representations with the knowledge of the falsity of said implied representations.

28. The above-referenced conduct of said defendants, their "alternate entities", and each of them, was motivated by the financial interest of said defendants, their "alternate entities", and each of them, in the continuing, uninterrupted research, manufacture, fabrication, design, labeling, assembly, design, distribution, lease, purchase, sale, offer for sale, inspection, installation, contracting for installation, repair, marketing, warranting, rebranding, manufacturing for others, packaging and advertising of asbestos and asbestos-containing products. In pursuance of said financial motivation, said defendants, their "alternate entities", and each of them, consciously disregarded the safety of "exposed persons" and were in fact consciously willing and intended to permit asbestos and asbestos-containing products to cause injury to "exposed persons" and induced persons to work with and be exposed thereto, including plaintiff.

29. Plaintiff relied upon defendants', their "alternate entities" and each of their representations, lack of warnings, and implied warranties of fitness of asbestos and their asbestos-containing products. As a direct, foreseeable and proximate result thereof, plaintiff has been injured permanently as alleged herein.

30. Defendants, their "alternate entities", and each of them, and their officers, directors and managing agents participated in, authorized, expressly and impliedly ratified,

and had full knowledge of, or should have known of, each of the acts set forth herein.

31. Defendants, and each of them, are liable for the fraudulent, oppressive, and malicious acts of their "alternate entities", and each of them, and each defendants' officers, directors and managing agents participated in, authorized, expressly and impliedly ratified, and had full knowledge of, or should have known of, the acts of each of their "alternate entities" as set forth herein.

32. The above-referenced conduct of said defendants, their "alternate entities", and each of them, was and is willful, malicious, fraudulent, outrageous and in conscious disregard and indifference to the safety and health of "exposed persons". Plaintiff, for the sake of example and by way of punishing said defendants, seeks punitive damages according to proof.

33. As a direct and proximate result thereof, plaintiff has suffered the injuries and damages previously alleged.

WHEREFORE, plaintiff prays judgment against defendants, their "alternate entities", and each of them, as hereinafter set forth.

THIRD CAUSE OF ACTION — FALSE REPRESENTATION UNDER RESTATEMENT OF TORTS SECTION 402-B

AS AND FOR A FURTHER, THIRD, SEPARATE AND DISTINCT CAUSE OF ACTION FOR FALSE REPRESENTATION UNDER RESTATEMENT OF TORTS SECTION 402-B, PLAINTIFF COMPLAINS OF DEFENDANTS, THEIR "ALTERNATE ENTI-

TIES" AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

34. Plaintiff incorporates by reference each and every paragraph of the First Cause of Action, and Paragraphs 15 and 16 of the Second Cause of Action.

35. At the aforementioned time when defendants, their "alternate entities", and each of them, researched, manufactured, fabricated, designed, tested or failed to test, inadequately warned or failed to warn, labeled, assembled, distributed, leased, bought, offered for sale, sold, inspected, serviced, installed, contracted for installation, repaired, marketed, warranted, rebranded, manufactured for others, packaged and advertised the said asbestos and asbestos-containing products, as hereinabove set forth, the defendants, their "alternate entities", and each of them, expressly and impliedly represented to members of the general public, including the purchasers and users of said product, and other "exposed persons", including the plaintiff herein and his employers, that asbestos and asbestos-containing products were of merchantable quality, and safe for the use for which they were intended.

36. The purchasers and users of said asbestos and asbestos-containing products, and other "exposed persons", including the plaintiff and his employers, relied upon said representations of defendants, their "alternate entities", and each of them, in the selection, purchase and use of asbestos and asbestos-containing products.

37. Said representations by defendants, their "alternate entities", and each of them, were false and untrue, and defendants knew at the time they were untrue, in that the asbestos and asbestos-containing products were not safe for their intended use, nor were they of merchantable quality as represented by defendants, their "alternate entities", and each of them, in that asbestos and asbestos-containing

products have very dangerous properties and defects whereby said products cause asbestosis, other lung disabilities and cancer, and have other defects that cause injury and damage to the users of said products and other "exposed persons", thereby threatening the health and life of said persons including plaintiff herein.

38. As a direct and proximate result of said false representations by defendants, their "alternate entities", and each of them, the plaintiff sustained the injuries and damages hereinabove set forth.

WHEREFORE, plaintiff prays judgment against defendants, their "alternate entities", and each of them, as hereinafter set forth.

FOURTH CAUSE OF ACTION — LOSS OF CONSORTIUM

AS AND FOR A FOURTH, SEPARATE, FURTHER AND DISTINCT CAUSE OF ACTION FOR LOSS OF CONSORTIUM, PLAINTIFF COMPLAINS OF DEFENDANTS, THEIR "ALTERNATE ENTITIES", AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

39. Plaintiff incorporates by reference each and every paragraph of the first, second and third causes of action.

5. For exemplary or punitive damages according to proof; and

6. For such other and further relief as the court may deem just and proper, including costs as provided in CCP § 998, CCP § 1032 and related provisions of law.

DATED: 5/3/88.

McQUAID, BEDFORD,
BRAYTON, CLAUSEN
& GRELL

By: /s/ CHARLOTTE B. MEEKS for
ALAN R. BRAYTON
Attorneys for Plaintiff

EXHIBIT "A"

Plaintiff's exposure to asbestos and asbestos-containing products occurred at various locations within the State of California, including but not limited to:

Location	Job Title	Years Worked
Kaiser Aerotech, San Leandro, CA	Machinist	1956-present

EXHIBIT "B"

Plaintiff's exposure to asbestos and asbestos-containing products caused severe and permanent injury to the plaintiff, including, but not limited to breathing difficulties, asbestosis, lung and/or other cancer, mesothelioma, and/or other lung damage. Plaintiff was diagnosed with asbestos-related cancer on or about August, 1987.

EXHIBIT "C"

Defendants, their "alternate entities", and each of them, knew, or should have known, and intended that the aforementioned asbestos and products containing asbestos would be used for insulation, construction, automotive, aircraft and other applications, including, but not limited to sawing, chipping, hammering, scraping, sanding, breaking, removal, "rip-out", and other manipulation.

PROPOSED

PRELIMINARY FACT SHEET

NEW FILING — ASBESTOS LITIGATION

(See General Order No. 29
In Re Complex Asbestos Litigation.)

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1. Name, address, and telephone number of law firm representing claimant:

   Name McQUAID, BEDFORD, BRAYTON, CLAUSEN & GRELL

   Address 999 Grant Avenue, P.O. Box 2109

   City Novato State CA

   Zip Code 94948 Telephone (415) 898-1555

2. Names of first named plaintiff and first named defendant on the caption of the complaint:

   Plaintiff ROBERT GAYLORD and JANET GAYLORD

   Defendant ABEX CORP., et al.

3. Date of claimant's birth: 9/19/32

4. Case involves (check appropriate boxes):

   (a) Injury ..... (X)

   (b) Wrongful Death ..... ( )

   (c) Consortium ..... (X)

5. Specify the nature or type of asbestos related injury alleged by the claimant. (E.g., Asbestosis; Lung Cancer-adenocarcinoma; Lung Cancer-mesothelioma; Pleural Thickening; Fibrosis, etc.)

   Asbestos-related cancer

6. Identify the industry location which is alleged to be the source of an asbestos exposure, and to the extent such is known, provide the beginning and ending year(s) of such exposure. Also specify claimant's (or claimant's decedent's) job title or job description during each period of exposure. (For example: "San Francisco Naval Shipyard — Pipefitter — 1939 — 1948." Examples of industrial locations of exposure might be a specific shipyard, a specific railroad maintenance yard, or perhaps more generalized descriptions such as "merchant marine" or "Construction." If a claimant had exposure during only a portion of a year, the answer should indicate that year as the beginning and ending year. E.g., 1947-1947.)

Industrial Location of Exposure	**Job Title at Time of Exposure**	**Year(s) of Exposure Beginning-End**
Kaiser Aerotech San Leandro, CA	Machinist	1956 — Present

EXHIBIT "A"

SUPERIOR COURT OF CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO

This form is required to be submitted to the Clerk for the use of the Court only at the time of commencement of any action in the San Francisco Superior Court except for the matters identified in Rule 1.0(2).

ATTORNEY OR PARTY WITHOUT ATTORNEY
(Name, Address and Phone Number)
McQUAID, BEDFORD, BRAYTON, CLAUSEN & GRELL (415) 898-1555
999 Grant Avenue, P.O. Box 2109
Novato, CA 94948

PLAINTIFF:

ROBERT GAYLORD and
JANET GAYLORD

VS.

DEFENDANT:

ABEX CORPORATION, et al.

CASE NO. 891562

CIVIL COVER SHEET
TRIAL DELAY REDUCTION
Rule 1.1(1)

CAUSE OF ACTION (Brief Statement of Case)
Plaintiff alleges damages as a result of personal injury, loss of consortium, and/or wrongful death as the result of asbestos-related disease caused by exposure to products manufactured or distributed by defendants.

NATURE OF SUIT (Place the number 1 on line for primary cause of action; place an X on line of any secondary causes)

____ Antitrust/Unfair Competition	____ P.I./Prop. Damage-Vehicle
X Asbestos	____ P.I./Prop. Damage-Other Than Vehicle
____ Bad Faith	____ Products Liability
____ Civil Rights	____ Malpractice — Medical
____ Construction	____ Malpractice — Non-Medical
____ Labor	____ Real Property
____ Wrongful Discharge	____ Securities/Investment
____ Landlord/Tenant	____ Tax
____ Negligence — Vehicle	____ Other _____.
____ Negligence — Non-Vehicle	

ANTICIPATED DEPOSITIONS

Plaintiff anticipates taking

at least 10 depositions
(Number)

CLASS ACTION?

X No _ Yes

JURY DEMAND ANTICIPATED?

_ No X Yes

Date May 4, 1988

Eric C. Solomon
Type Name

/s/ Charlotte B. Meeks
Signature

TO BE COMPLETED BY THE COURT

CASE ASSIGNED TO JUDGE _____

CIVIL COVER SHEET
TRIAL DELAY REDUCTION RULE 1.1(1)

APPENDIX 5

STEPHEN C. KENNEY, ESQ.
GEORGE J. KELLER, ESQ.
Law Offices of
FISHER & HURST
Four Embarcadero Center
San Francisco, California 94111
(415) 958-8000

Attorneys For Defendant
B.P. CHEMICALS (HITCO) INC.,
sued herein as DOE 93, and designated
incorrectly as "U.S. POLYMERIC"

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO**

ROBERT GAYLORD and
JANET GAYLORD,

Plaintiffs,

vs.

ABEX CORPORATION; ACandS, INC.; AMERICAN ASBESTOS COMPANY; AMERICAN MOTORS CORPORATION; AMOSA (PTY), LTD.; THE ANCHOR PACKING COMPANY; A.P. GREEN REFACTORIES, INC.; ARMCO, INC.; ARMSTRONG WORLD INDUSTRIES, INC.; ASARCO INCORPORATED; ASSOCIATED MINERAL CORPORATION, AG; ATLAS ASBESTOS COMPANY, LTD.; ATLAS-TURNER, INC.; ATLAS-TURNER COMPANY, LTD.; BABCOCK & WILCOX COMPANY; BEADEX MANUFACTURING, INC.; BELL ASBESTOS MINES, LTD.; THE BENDIX CORPORATION; BES-TEX, INC.; BIGELOW-LIPTAK CORPORATION; BLUE DIAMOND CORPORATION; BORG-WARNER CORPORATION; BOTSWANA FIBERS, LTD.; BROWER COMPANY/BROWER CONSTRUCTION; BURLINGTON INDUSTRIES, INC.; CAPASO, LTD.; CAPE ASBESTOS FIBERS, LTD.; CAPE BLUE MINES (PTY), LTD.; CAPE INDUSTRIES, PLC; CAPE INDUSTRIES OVERSEAS LTD.; CAREY CANADA, INC.; CARLISLE CORPORATION; CASSIAR ASBESTOS COMPANY, LTD.; THE CELOTEX CORPORATION; CENTRAL MINING FINANCE, LTD.; CERTAIN-TEED CORPORATION; CHARTER CONSOLIDATED, LTD.; CHARTER CONSOLIDATED, PLC; COMMODATA (PTY), LTD.; CORK MANUFACTURING COMPANY; CRANE PACKING CO.; CHRYSLER CORPORATION; COMBUSTION ENGINEERING, INC.; DEVCON CORPORATION; M.H. DETRICK CO.; E.J. BARTELLS CO.; EAGLE-PICHER

NO: 891562

ANSWER OF DEFENDANT B.P. CHEMICALS (HITCO) INC. TO PLAINTIFFS' COMPLAINT FOR PERSONAL INJURY AND LOSS OF CONSORTIUM

INDUSTRIES, INC.; EAST BAY GASKET, INC.; EGNEP (PTY), LTD.; ESSEX GROUP, INC.; EXCELSIOR, INC.; FIBREBOARD CORPORATION; FIBREX, INC.; FIRESTONE TIRE & RUBBER CORPORATION; FIRETARD (PTY), LTD.; FLEXITALLIC GASKET CO., INC.; FLINTKOTE COMPANY; FORD MOTOR COMPANY; FOSTER-WHEELER, INC.; GAF CORPORATION; GARLOCK, INC.; GASKET SPECIALISTS, INC.; GENERAL DYNAMICS CORPORATION; GENERAL ELECTRIC COMPANY; GENERAL MOTORS CORPORATION; GENERAL VENEER MANUFACTURING COMPANY; GENSTAR COMPANY; GOODYEAR AEROSPACE CORPORATION; GOODYEAR TIRE AND RUBBER COMPANY; GROENWATER ASBESTOS MINING COMPANY (PTY), LTD.; HAMILTON DISTRIBUTING, INC.; HAMILTON MATERIALS, INC.; HAVELOCK ASBESTOS MINES (SWAZILAND), LTD.; H.K. PORTER COMPANY, INC.; HITCO; INTERNATIONAL ASBESTOS, LTD.; J.P. STEVENS & CO., INC.; JIM WALTER CORP.; JOHN CRANE-HOUDAILLE, INC.; KAISER ALUMINUM & CHEMICAL; KAISER CEMENT CORPORATION; KAISER GYPSUM COMPANY, INC.; KAISER STEEL CORPORATION; KEASBEY-MATTISON COMPANY; KEENE BUILDING PRODUCTS, INC.; KEENE CORPORATION; KELLY-MOORE PAINT COMPANY, INC.; LAKE ASBESTOS OF QUEBEC, LTD.; LEAR-SIEGLER, INC.; LOUISIANA PACIFIC; MacARTHUR COMPANY; MAREMONT CORPORATION; NASCO AVIATION CORPORATION; NATIONAL GYPSUM COMPANY; NAVISTAR INTERNATIONAL CORPORATION; NIANTIC RUBBER COMPANY; NORTON COMPANY; NUTURN CORPORATION; OWENS-CORNING FIBERGLAS CORPORATION; OWENS-ILLINOIS, INC.; PARKER-HANNIFIN CORP.; PITTSBURGH CORNING CORP.; PLANT INSULATION CO.; POWHATTAN MINING CO.; RAYMARK INDUSTRIES, INC.; RAYTECH CORPORATION; RAYBESTOS-MANHATTAN, INC.; RICH-TEX, INC.; ROOTPORT BLUE ASBESTOS (PTY), LTD.; SEPCO, INC.; SHABANI & MASHABA MINES (PVT), LTD.; SHAMROCK, INC.; SOUTHERN PACIFIC COMPANY; SOUTHERN TEXTILE CO.; STANDARD ASBESTOS MFG. AND INSULATION CO.; SUPRO CORPORATION; THE B.F. GOODRICH COMPANY; THE SYNKOLOID COMPANY; THIOKOL CORP.; TURNER & NEWALL, LTD.; TURNER & NEWALL HOLDINGS (PVY), LTD.; TURNER & NEWALL INDUSTRIES, INC.; TURNER & NEWALL

INTERNATIONAL LTD.; TURNER ASBESTOS FIBERS, LTD.; TURNER-NEWALL PLC; UNIROYAL, INC.; UNITED STATES GYPSUM COMPANY; UNITED STATES MINERAL PRODUCTS COMPANY; UNION CARBIDE CORPORATION; WAGNER ELECTRIC CORPORATION; WALDRON, DUFFY & SMITH; WESTERN MacARTHUR CO.; WORLD BESTOS CO.; W.R. GRACE & CO.; and FIRST DOE through ONE HUNDREDTH DOE, inclusive,

Defendants.

COMES NOW defendant B.P. CHEMICALS (HITCO) INC., sued herein as DOE 93, and designated incorrectly as "U.S. POLYMERIC," and in answer to plaintiffs ROBERT and JANET GAYLORD'S Complaint for Personal Injury and Loss of Consortium, on file herein, denies and alleges as follows:

1. Pursuant to the provisions of Section 431.30(d) of the Code of Civil Procedure, this answering defendant denies each and every, all and singular, both generally and specifically, the allegations of said Complaint, and each and every cause of action contained therein, and further denies that plaintiffs have been damaged in the sums alleged, or in any way at all, by reason of any negligence, act or omission of this defendant.

FIRST AFFIRMATIVE DEFENSE

AS AND FOR A FIRST, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO EACH AND EVERY CAUSE OF ACTION OF THE PLAINTIFFS' COMPLAINT THAT CHARGES OR RELATES TO THIS ANSWERING DEFENDANT OR PURPORTS TO CHARGE OR RELATE TO THIS ANSWERING

DEFENDANT, THIS ANSWERING DEFENDANT ALLEGES AS FOLLOWS:

2. That plaintiffs' Complaint, and each and every purported cause of action of said Complaint, fails to state a cause of action against this answering defendant.

SECOND AFFIRMATIVE DEFENSE

AS AND FOR A SECOND, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO EACH AND EVERY CAUSE OF ACTION OF THE PLAINTIFFS' COMPLAINT THAT CHARGES OR RELATES TO THIS ANSWERING DEFENDANT OR PURPORTS TO CHARGE OR RELATE TO THIS ANSWERING DEFENDANT, THIS ANSWERING DEFENDANT ALLEGES AS FOLLOWS:

3. Plaintiffs were careless and negligent in and about the matters alleged in the Complaint and that said carelessness and negligence of plaintiffs proximately contributed to the happening of the accident, incident and occurrence alleged in the Complaint, and to the injuries, losses and damages complained of therein, if any there were, and that said plaintiffs' contributory negligence bars a recovery, or proportionally reduces any potential verdict.

THIRD AFFIRMATIVE DEFENSE

AS AND FOR A THIRD, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO EACH AND EVERY CAUSE OF ACTION OF THE PLAINTIFFS' COMPLAINT THAT CHARGES OR RELATES TO THIS ANSWERING DEFENDANT OR PURPORTS TO CHARGE OR RELATE TO THIS ANSWERING

DEFENDANT, THIS ANSWERING DEFENDANT ALLEGES AS FOLLOWS:

4. This answering defendant is informed and believes and based upon such information alleges that the injuries and damages alleged in the Complaint, if any occurred, were proximately caused by the sole negligence of the plaintiffs, which sole negligence bars plaintiffs' recovery, if any, or which should be reduced in proportion to the amount by which the plaintiffs' negligence contributed to the happening of the injuries and damages alleged.

FOURTH AFFIRMATIVE DEFENSE

AS AND FOR A FOURTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO EACH AND EVERY CAUSE OF ACTION OF THE PLAINTIFFS' COMPLAINT THAT CHARGES OR RELATES TO THIS ANSWERING DEFENDANT OR PURPORTS TO CHARGE OR RELATE TO THIS ANSWERING DEFENDANT, THIS ANSWERING DEFENDANT ALLEGES AS FOLLOWS:

5. Plaintiffs voluntarily and knowingly entered into and engaged in the operations, acts and conduct alleged in said Complaint and voluntarily and knowingly assumed all of the risks incident to said operations, acts and conduct at the times and places mentioned in said Complaint, and that said assumption of risk either bars recovery by plaintiffs against this answering defendant or proportionately reduces any such recovery.

FIFTH AFFIRMATIVE DEFENSE

AS AND FOR A FIFTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO EACH AND EVERY CAUSE OF ACTION OF THE PLAINTIFFS' COMPLAINT THAT CHARGES OR RELATES TO THIS ANSWERING DEFENDANT OR PURPORTS

TO CHARGE OR RELATE TO THIS ANSWERING DEFENDANT, THIS ANSWERING DEFENDANT ALLEGES AS FOLLOWS:

6. Plaintiffs' damages and injuries, if any, were proximately caused or contributed to, in whole or in part, by the negligence or fault or other acts and/or omissions of persons or entities other than this defendant, for which this defendant is not responsible.

SIXTH AFFIRMATIVE DEFENSE

AS AND FOR A SIXTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO EACH AND EVERY CAUSE OF ACTION OF THE PLAINTIFFS' COMPLAINT THAT CHARGES OR RELATES TO THIS ANSWERING DEFENDANT OR PURPORTS TO CHARGE OR RELATE TO THIS ANSWERING DEFENDANT, THIS ANSWERING DEFENDANT ALLEGES AS FOLLOWS:

7. Plaintiffs' action herein is for alleged personal injury and loss of consortium, based upon principles of comparative fault and, accordingly, pursuant to the provisions of Civil Code Section 1431, *et seq.*, this answering defendant's liability, if any, for non-economic damages, if any, shall be several only and shall not be joint; this answering defendant requests a judicial determination of the amount of non-economic damages, if any, allocated to this answering defendant in direct proportion to this defendant's percentage of fault, if any, and a separate judgment in conformance therewith.

SEVENTH AFFIRMATIVE DEFENSE

AS AND FOR A SEVENTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO EACH AND EVERY CAUSE OF ACTION OF THE PLAINTIFFS' COMPLAINT THAT CHARGES OR RE-

LATES TO THIS ANSWERING DEFENDANT OR PURPORTS TO CHARGE OR RELATE TO THIS ANSWERING DEFENDANT, THIS ANSWERING DEFENDANT ALLEGES AS FOLLOWS:

8. This answering defendant is informed and believes and based upon such information and belief alleges that the negligence, or fault, if any, of this answering defendant, was not a substantial factor in bringing about the plaintiffs' damages, and therefore, was not a contributing cause thereof, but was superceded by the negligence and fault of others, whose negligence and fault was an independent, intervening and proximate cause of any injury or damage suffered by plaintiffs herein, and that, thereby, plaintiffs have no right of recovery against this answering defendant.

EIGHTH AFFIRMATIVE DEFENSE

AS AND FOR AN EIGHTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO EACH AND EVERY CAUSE OF ACTION OF THE PLAINTIFFS' COMPLAINT THAT CHARGES OR RELATES TO THIS ANSWERING DEFENDANT OR PURPORTS TO CHARGE OR RELATE TO THIS ANSWERING DEFENDANT, THIS ANSWERING DEFENDANT ALLEGES AS FOLLOWS:

9. The act, or omission to act, of this answering defendant (which allegation is made for the purpose of this pleading only, and shall not constitute an admission), was not a substantial factor in bringing about the alleged damages to plaintiffs and, therefore, was not the proximate cause of any injury or damages suffered by the plaintiffs.

NINTH AFFIRMATIVE DEFENSE

AS AND FOR A NINTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO EACH AND EVERY CAUSE OF ACTION OF THE PLAINTIFFS'

COMPLAINT THAT CHARGES OR RELATES TO THIS ANSWERING DEFENDANT OR PURPORTS TO CHARGE OR RELATE TO THIS ANSWERING DEFENDANT, THIS ANSWERING DEFENDANT ALLEGES AS FOLLOWS:

10. To the extent that any injury, damage or loss sustained by plaintiffs was proximately caused by their failure to mitigate their damages by failing to exercise reasonable case in caring for such injury, damage or loss preventing the aggravation, such failure bars or diminishes any recovery herein by plaintiffs.

TENTH AFFIRMATIVE DEFENSE

To the extent the Complaint asserts defendant's alleged "market share" liability, or "enterprise liability," the Complaint fails to state facts sufficient to constitute a cause of action against defendant.

ELEVENTH AFFIRMATIVE DEFENSE

Neither the Complaint nor any purported cause of action alleged herein states facts sufficient to entitle plaintiffs to an award of punitive damages against defendant.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiffs' action, and each alleged cause of action, is barred by the applicable statute of limitations, including but not limited to California Code of Civil Procedure, Sections 338(1), 338(4), 339(1), 340(1), 340(3), 340.2, 343, 353, 583.110, 583.210, 583.310 and 583.410 and California Commercial Code, Section 2725.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiffs unreasonably delayed in bringing this action, without good cause therefor, and thereby have prejudiced

defendant as a direct and proximate result of such delay; accordingly, this action is barred by laches.

FOURTEENTH AFFIRMATIVE DEFENSE

The products referred to in the Complaint were misused, abused or altered by plaintiffs or by others; the misuse, abuse or alteration was not reasonably foreseeable to defendant, and proximately caused any loss, injury or damages incurred by plaintiffs.

FIFTEENTH AFFIRMATIVE DEFENSE

Defendant alleges that its products were manufactured, produced, supplied, sold and distributed in mandatory conformity with specifications promulgated by the United States Government under its war powers, as set forth in the United States Constitution, and that any recovery by plaintiffs on the Complaint on file herein is barred in consequence of the exercise of those sovereign powers.

SIXTEENTH AFFIRMATIVE DEFENSE

Defendant alleges that its products were manufactured, produced, supplied, sold and distributed pursuant to contract with the United States Government, and that any recovery by plaintiffs on the Complaint filed herein is barred by consequence of the judicially recognized doctrine of immunity conferred upon that contractual relationship, and any occurrences arising therefrom.

SEVENTEENTH AFFIRMATIVE DEFENSE

Defendant alleges that at the time of the injuries alleged in the Complaint, plaintiffs were employed and were entitled to receive Workers' Compensation benefits from their employers; that all of plaintiffs' employers, other than defendant, were negligent in and about the matters referred to in said Complaint, and that such negligence on the part of

said employers proximately and concurrently contributed to the happening of the accident and to the loss or damage complained of by plaintiffs, if any there were; and that by reason thereof defendant is entitled to set off any such benefits to be received by plaintiffs against any judgment which may be rendered in favor of plaintiffs.

EIGHTEENTH AFFIRMATIVE DEFENSE

Defendant alleges that at all times relative to matters alleged in the Complaint, all of plaintiffs' employers, other than defendant, were sophisticated users of asbestos-containing products and said employers' negligence in providing the product to its employees in a negligent, careless and reckless manner was a superseding intervening cause of plaintiffs' injuries, if any there were.

NINETEENTH AFFIRMATIVE DEFENSE

If plaintiffs have received, or in the future may receive, Workers' Compensation benefits from defendant under the Labor Code of the State of California as a consequence of the alleged industrial injury referred to in the Complaint, and in the event plaintiffs are awarded damages against defendant, defendant claims a credit against this award to the extent that defendant is barred from enforcing its rights to reimbursement of Workers' Compensation benefits that plaintiffs have received or may in the future receive.

WHEREFORE, this answering defendant prays that plaintiffs take nothing against it by reason of their Complaint herein; and,

1. That the Complaint be hence dismissed;

2. That judgment be entered in favor of defendant;

3. For recovery of costs of suit herein incurred;

4. For a judicial determination of the amount of non-economic damages, if any, allocated to this answering defendant in direct proportion to this defendant's percentage of fault, if any, and a separate judgment in conformance therewith;

5. For such other and further relief as this Court may deem proper.

DATED: June 7, 1990 FISHER & HURST

By: /s/ STEPHEN C. KENNEY
STEPHEN C. KENNEY
Attorneys for Defendant
B.P. CHEMICALS
(HITCO) INC.,
sued herein as DOE 93,
and designated incorrectly
as "U.S. POLYMERIC"

PROOF OF SERVICE

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is Four Embarcadero Center, 25th Floor, San Francisco, California, 94111. On June 8, 1990, I served the within ANSWER OF DEFENDANT B.P. CHEMICALS (HITCO) INC. TO PLAINTIFFS' COMPLAINT FOR PERSONAL INJURY AND LOSS OF CONSORTIUM on the parties in said cause, by mailing a true copy thereof in a sealed envelope to:

SEE ATTACHED LIST

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on June 8, 1990, at San Francisco, California.

/s/ MAUREEN L. STONE
Maureen L. Stone

___ ANDERSON, GALLOWAY & LUCC , North California Blvd., ste. 500, Walnut Creek, CA 94596 for: Brobeck & Wilson

___ BENNET, SAMUELSEN, REYNOLDS & ALLARD, 1951 Webster St., Ste. 200, Oakland, CA 94612 for: U.S. Mineral/Dirwiddie/M.A. Refractories Co.

_X_ BERRY & BERRY, 505 Fourteen St., 12th Flr., Oakland, CA 94612 for: Designated Defense Counsel

___ BISHOP, MOLE & REID, 445 California St., 11th Flr., San Francisco, CA 94104 for: PPS

___ BJORK, FLEER & LAWRENCE, 483 - 9th St., Oakland, CA 94607 for: Raymark/Celetex/Carey Canada

___ BOGLE & GATES, 1400 KDIM Center, 222 S.W. Columbia, Portland, OR 97201 for: W.K. Porter

___ BRANSON, FITZGERALD & HOWARD, 663 Bair Island Rd., Ste. 400, P.O. Box 2189, Redwood City, CA 94066-2189 for: Syrdoloic

_X_ BRAYTON & ASSOCIATES, 999 Grant Avenue, P.O.S. 2109, Novato, CA 94948

_X_ BROBECK, PHLEGER & HARRISON, Spear Street Tower, #1 Market Plaza, San Francisco, CA 94105 for: ACards/Fibreboard/Pareffine/Pebco/Owens-Illinois/Pittsburg Corning

___ BRONSON, BRONSON & MCKIMMON, 100 B Street, Ste. 400, Santa Rosa, CA 95401 for: Sesame-Sierra/Sacoma Mfg./Parker-Mannifir/Airce Weld

___ BURNWILL, MOREHOUSE, BURFORD, et al., 1220 Oakland Blvd., P.O. Box 5168, Walnut Creek, CA 94596 for: Kelly-Moore

___ CARROLL, BURDICK & MCDOMOUGH, 44 Montgomery Street, Suite 400, San Francisco, CA 94104 for: Empire Ace/Stevens/Detrick/Volkswagen/Sacramento Indus. Supply

___ CLAPP, MORONEY, BELLAGUASA, DAVIS & VUCIMICH, 4400 Bohannan Drive, Suite 100, Menlo Park, CA 94025 for: W.R. Grace-Can

___ CROSBY, HEAFEY, ROACH & MAY, 1999 Harrison St., Oakland, CA 94612 for: Lear Siegler/Weridestes/ Royal Ind./So.Pes./Chrysler/Westinghouse/Chevron/Shell Oil Company/American Motors Corp.

___ ERICKSEN, ARBUTHNOT, WALSH, et al., 535 Mira Vista Ave., Oakland, CA 94610 for: Firestone/Goodyear Tire & Rubber/Swinertan & Walberg/Bridgstone/American Biltrite

___ FIMAN, WHITE, et al., 150 Spear St., Ste. 1725, San Francisco, CA 94105 for: E.J. Bartells/Alaska Packers Assn.

___ GLASPY & GLASPY, 201 We. Civic Dr., Ste. 245, Walnut Creek, CA 94596 for: Arleck/Colt Ind.

___ GORDON & REES, 275 Battery St., 20th Flr., San Francisco, Ca 94111 for: Bendix (Allied Corp.)/W.R. Grace/FORECO, Inc

___ HARDIN, COOK, LOPER, et al., Lake Merritt Plaza, 1999 Harrison St., 18th Flr., Oakland, CA 94612-3506

_X_ HASSARD, BONNINGTON, ROGERS & MUBER, 5 Fremont Center, 50 Fremont St., Ste. 3400, San Francisco, CA 94105 for: ACandS/Fibreboard/Peraffine/Pabco/Owens-Illinois-Pittsburgh-Corning

___ HILL, GENSON, et al., 505 Shette Place, Los Angeles, CA 90020 for: Bendix (Allied Corp)/Uniroyal

___ JACKSON, WALLACE & HAYDEN, 33 New Montgomery St., 18th Flr., San Francisco, CA 94105 for: Eagle-Picher

___ JEDEIKIN, GREEN, SPRAGLE & BISHOP, 300 Montgomery St., Suite 450, San Francisco, CA 94104-1906 for: Asbestos Corp./Areasdon/Cook Rubber Co.

___ KAZAN & MCCLAIN, 171 Twelfth St., Suite 300, Oakland, Ca 94607

___ KINCAID, GIAMAZIO, et al., 200 Webster St., Ste. 200, P.O. Box 1828, Oakland, CA 94604 for: Kaiser Can./Kaiser Gypsum/ Goe. Short/Basket Sp/ Domstar/ Permanente Steamship

___ KNOX, RICKSON, et al., 1999 Harrison St., Ste. 1700, Oakland, CA 94612 for: Combustion Eng./J.T. Thorpe Devsen/S.K.Wellman/Foster Wheeler Corp.

___ LAMDELS, RIPLEY & DIAMOND, 450 Pacific, San Francisco, CA 94133 for: Flintkote/Genstar/Blue Diamond

___ LOW, BALL & LYNCH, 601 California St., 2st Flr., San Francisco, Ca 94106 Amer. Ash/Bendix/Gen. Verser/U.S. Steel/Mead-Clark

___ LYNCH, LOOFBOURROW, HELMENSTINE, et. al., 505 Beach St., San Francisco, CA 94133 for: Dowran Products/Kowerne Boiler

_X_ MARROW, REID & SWEENY, The International Bldg., 601 California St., Ste. 1200, San Francisco, CA 94108-2896 for: Georgia Pacific

___ MCDONALD, CULLOM & BURLAND, 633 XXXXXXXXX St., Ste. 728, San Francisco, CA 94111 for: Crane Perkins/Crane-Mandeille

___ MCELYNE, MCLORE & MCDOWELL, Bayside Plaza, 136 Embarcadero, Ste. 200, San Francisco, CA 94105 for: Borg-Warner/Shell/Steady Co./Triple A Machine Shop

___ MCNAMARA, HOUSTON, DODGE, MCCLURE & WEY, P.O. Box 5288, Walnut Creek, CA 94596 for Uniroyal/Bendix (Allied Corp.)

_X_ MORGENSTEIN, LACE & JUBELIRER, The Federal Reserve Bank Bldg., 101 Market St., 6th Flr., San Francisco, CA 94105 for: ACarde/Fibreboard/Pereffina/Pabco/Owens-Illinois-Pittsburg-Corning

___ PARICHAN, REYNOLDS, CROSSMAN & HARVEY, 2330 W. Shaw, Ste. 130, Fresno, CA 93711 for: General Motors

___ PETTIT & MARTIN, 101 California St., 35th Flr., San Francisco, CA 94111 for: ASARCO/Lake Asbestos

___ PILLSBURY, MADISON & SUTRO, P.O. Box 7830, San Francisco, CA 94120 for: Standard Oil/Chevron/Du-Pont/American Brands/American Tobacco/Bethlehem Steel

___ POND, SHJEFLO & WOM, 1730 South El Camino Real, 6th Flr., San Mateo, CA 94402 for: Thorpe Insulation

___ POPELKA, ALLARD, et al., 160 W. Santa Clara Street, Suite 1300, San Jose, CA 95113 for: Owens-Corning Fiberglas

___ MARK H. ROSENTHAL, Esq., 50 California St., 30th Flr., San Francisco, CA 94111 for: Crown, Cork & Seal

___ SEDGWICK, DETERT, MORAN & ARNOLD, 1 Embarcadero Center, 16th Flr., San Francisco, CA 94111 for:Brown & Williamson Tobacco Corp./General Electric

___ SHEPPARD, MULLIN, RICHTER & HAMPTON, 4 Embarcadero Center, 17th Flr., San Francisco, CA 94111 for: Amer. Optical Corp.

_X_ SHIELD & SMITH, 580 California St., Ste. 1400, San Francisco, CA 94104 for: CCR

___ STARK, WELLS, RAHL, FIELD & SCHWARTZ, Lake Merritt Plaza, 1999 Harrison St., Ste. 1300, Oakland, CA 94612 for: Cassier

___ STEVENS & DELMONICO, 1910 Olympic Blvd., Ste. 250, Walnut Creek, CA 94596 for: Asbestos Corp., Ltd./Bell/Atlas

___ SULLIVAN, ROCHE & JOHNSON, 220 Bush St., 20th Flr., Mills Tower Bldg., San Francisco, CA 94104-33339 for: Abex Corp.

___ TARKINGTON, O'CONNOR & O'NEILL, One Market Plaza, Spear Street Tower, Ste. 4100, San Francisco, CA 94105 for: Plant Insulation

___ THELEN, MARRIN, JOHNSON & BRIDGES, #2 Embarcadero Center, San Francisco, CA 94111 for: Philip Morris

___ THOMPSON & HELLER, 3500 American River Dr., Ste. 101, Sacramento, CA 95864 Lear Siegler/Royal Industries/World Bestos Co./Hopeman Brothers, Inc.

___ TOLPESIN, IMAI & TADLOCK, One Post St., Ste. 2400, San Francisco, CA 94104 for: Rich-Tex/A.W. Chesterton/Mine Safety Appliances Co.

___ TOMLINSON, ZISKO, MOROSOLI & MASER, 430 California Ave., 2nd Flr., Palo Alto, CA 94306 for: Wagner Electric

___ WALSWORTH, FRANKLIN & BEVINS, One Montgomery St., West Tower, Ste. 2121, San Francisco, CA 94104 for: Hamilton Materials

_X_ WEINTRAUB, GENSULEA, et al., 2535 Capitol Oaks Dr., Sacramento, CA 95833 for: Dexter

___ WISE, WIEZOREK, TIMMONS & WISE, 868 So. Figueroa, Ste. 840, Los Angeles, CA 90017 for: Auto Specialties

___ WRIGHT, ROBINSON, et al., 101 California ST., San Francisco, CA 94111 for: Owens-Corning Fiberglas

_X_ ROPERS, MAJESKI, et al., 655 Montgomery St., Ste. 1600, San Francisco, CA 94111 for: Manville Corp. Asbestos Disease Compensation Fund

APPENDIX 6

STEPHEN C. KENNEY, ESQ.
JEFFERY J. FADEFF, ESQ.
KENNEY, BURD, KNUTSON & MARKOWITZ
4 Embarcadero Center, Suite 2500
San Francisco, California 94111
Telephone: (415) 397-3100

Attorneys for Defendant
BP CHEMICALS (HITCO) INC.

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO**

ROBERT GAYLORD and JANET GAYLORD,

Plaintiffs,

v.

BP CHEMICALS (HITCO) INC.,

Defendant.

CASE NO. 891562

TRIAL BRIEF IN SUPPORT OF DEFENDANT BP CHEMICALS' MOTION FOR DIRECTED VERDICT BASED ON THE MILITARY CONTRACTOR'S DEFENSE

TRIAL DATE: June 15, 1992
(Phase II)
TIME: 9:30 a.m.

DEPT: 19
JUDGE: The Hon. Laurence Kay

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Defendant BP CHEMICALS (HITCO) INC. (hereinafter "BP CHEMICALS") hereby submits this trial brief in support of its motion for directed verdict.

I

INTRODUCTION

Plaintiff ROBERT GAYLORD was allegedly exposed to asbestos while working as a tracer-lathe machinist at the Kaiser Aerospace facility in San Leandro, California. The product supplied by BP CHEMICALS' predecessor, US Polymeric, was an asbestos-containing tape wrap produced pursuant to military specifications and used in the assembly of missiles.

Plaintiffs' causes of action against BP CHEMICALS are barred by the military contractor's defense. This defense is based on the principle that procurement of military equipment is a uniquely federal interest that is so fully under federal control that any conflicting state law attempting to impose tort liability on an independent military contractor must be pre-empted. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 101 L.Ed.2d 442 (1988).

II

LEGAL ANALYSIS

A. THE STANDARD FOR GRANTING DEFENDANT'S MOTION FOR DIRECTED VERDICT

The standard for ruling on motions for nonsuit and directed verdict is stated in the seminal case of *Estate of Lances* (1932) 216 Cal. 397, 400. The court held that:

> It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A

> nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence all the value to which it is legally entitled, therein including in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given.' [Citations omitted.] Unless it can be said as a matter of law ... no other reasonable conclusion is legally deducible from the evidence ... the trial court is not justified in taking the case from the jury.

A directed verdict, like a motion for a nonsuit, is in the nature of a demurrer to the evidence. *Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 196 Cal.Rptr. 117; *see* Cal. Code Civ. Proc. § 629.

BP CHEMICALS is entitled to a directed verdict in its favor on the basis that the military contractor's defense bars all of plaintiffs' causes of action.

B. THE MILITARY CONTRACTOR'S DEFENSE PRE-EMPTS PLAINTIFFS' STATE LAW CLAIMS

The courts have recognized that the federal government's policy-making powers would be significantly impaired if the government, after making informed judgments and policy choices, were subject to liability under the separate tort laws of the fifty states. *Sanner v. Ford Motor Co.* (1976) 144 N.J.Super. 1, 364 A.2d 43. The *Sanner* court, in a lawsuit involving an Army jeep that was manufactured in compliance with Army specifications, held that:

> To impose liability on a governmental contractor who strictly complies with the plans and specifications provided to it by the Army, in a situation like this would seriously impair the government's ability to formulate policy and make judgments pursuant to its war powers.

The defense was further defined in *re Agent Orange Products Liability Litigation*, 534 F.Supp. 1046 (E.D. NY 1982) as follows:

> The purpose of a government contractor defense in the context of this case is to permit the government to wage war in whatever manner the government deems advisable and to do so with the support of the suppliers of military weapons. Considerations of costs, time of production, risks to participants, risks to third parties and any other factors that might weigh on the decision whether, when and how to use a particular weapon, are uniquely questions for the military and should be exempt from review by civilian courts. *Agent Orange*, 534 F.Supp. at 1054, n1.

The *Agent Orange* court cited five reasons in support of pre-emption. First, to impose liability on an otherwise innocent contractor whose only role in causing the injury was to conform with specifications supplied by the Government would misapply tort liability principles. The *Agent Orange* court reasoned that:

> *Tort liability principles properly seek to impose liability on the wrongdoer* whose act or omission caused the injury, *not on the otherwise innocent contractor whose only role in causing the injury was the proper performance of a plan supplied by the government.* The imposition of tort liability on a wrongdoer can have a strong prophylactic effect; tortfeasors held liable for damages that flow from their wrongdoing have a strong incentive to prevent the occurrence of future harm. [Citation omitted]. Before any societal benefit can be derived from the deterrent effects of tort liability, however, the party in a position to correct the tortious act or omission must be held accountable for the damages caused and thus motivated to prevent future torts. *Agent Orange*, 506 F.Supp. 762 (E.D. NY 1980), *rev.* on other

grounds, 635 F.2d 987, *cert. den.* 465 U.S. 106. [Emphasis added].

Second, the *Agent Orange* court stated that to impose liability on the contractor for the government's planning failures would render the government military contractor's defense meaningless. *Agent Orange*, 506 F.Supp. at 794 [citation omitted].

Third, "if the contractor was held liable, contract prices to the Government would be increased to cover the contractor's risk of loss from possible effects of complying with decisions of [governmental] officers authorized to make policy judgments." [citation omitted]. *Id.*

Fourth, these considerations "take on increased significance when the government contracts with manufacturers of military ordinance in wartime." *Id.* Where manufacturers are compelled to "produce a weapon of war without the ability to negotiate specifications, contract price or terms, the potential for unfairly imposing liability becomes great." *Id.* Without the defense, a supplier capable of producing military supplies for government use would "face the untenable position of choosing between severe penalties for failing to supply products necessary to conduct a war, and producing what the government requires but at a contract price that makes no provision for the need to insure against potential liability for design flaws in the government's plans." *Id.*

Fifth, the federal government's policy-making powers would be significantly impaired if the government, after making judgments and policy choices, were to be faced with fifty sets of state tort liability laws. To hold a defendant who supplied a product subject to federal controls and specifications violates the considerations of "fairness and public policy" endorsed by the *Agent Orange* court.

The *Agent Orange* court established a three-part test to determine whether a defendant can successfully assert the government contractor defense. The *Agent Orange* test required that: (1) the government established the specifications for the product; (2) the product met the government specifications in every material respect; and, (3) the government knew as much or more than the defendant about the dangers that accompany the use of the product.

The first case to adapt the *Agent Orange* test was *Koutsoubos v. Boeing Vertol*, 553 F.Supp. 340 (E.D. Pa. 1982), *aff'd.*, 755 F.2d 352 (3rd Cir.), *cert. den.*, 106 S.Ct. 72 (1985). In *Koutsoubos*, three crewmen were killed when a Navy helicopter manufactured by Boeing Vertol crashed during a rescue training exercise. The plaintiff claimed that the helicopter was unsafe, unairworthy and dangerously unfit for its intended use; further, the plaintiff asserted that the government contractor defense did not apply where the government contractor *consulted* with the military about the specifications for the product being manufactured. The District Court granted defendants' summary judgment based on the government contractor defense and the appeals court affirmed. The court stated that defendant had shown that the government established the specifications for the helicopter, finding:

> Defendant established . . . that the general and detailed specifications were established by the Navy and that Boeing furnished an aircraft that had all the requirements of the military specification. An examination of the specifications by the court showed that the Navy established the specifications crucial to plaintiff's allegations of defective design. *Koutsoubos*, 553 F.Supp. at 343-344. [Emphasis added].

In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-506, 101 L.Ed.2d 442 (1988), a United States Marine helicopter co-pilot drowned when he was unable to escape

after his helicopter crashed in the ocean during a training exercise. Representatives of the co-pilot's estate filed an action against the helicopter manufacturer, including claims of design defects as to the co-pilot's escape hatch.

The *Boyle* court significantly broadened *Agent Orange* holding stating that certain areas involving uniquely federal interests, such as the procurement of military equipment from independent contractors, are so fully under federal control that any conflicting state law attempting to impose tort liability on these independent contractors must be pre-empted. *Id.* at 504-506. Pre-emption of state law will occur when a "significant conflict" exists between an identifiable federal policy or interest and state law and the application of state law would frustrate federal objectives. *Boyle, supra,* 487 US at 507.

Liability cannot be imposed under state law when:

(1) The United States approved reasonably precise specifications;

(2) The equipment conformed to those specifications;

(3) The supplier warned the United States about the dangers in the use of the equipment that were known to the supplier, but not to the United States. *Boyle, supra,* 487 U.S. at 512.

Boyle relaxed the military contractor's burden in that the military contractor need only prove government approval, rather than government preparation and promulgation of specifications.

Boyle also broadened the military contractor's defense so that it applies to claims brought by civilians as well as members of the armed forces. *Id.* at 511.

The *Boyle* decision precludes state law interference with federal government decisions in the production of military equipment. The *Boyle* court noted:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. *Boyle, supra*, 487 U.S. at 511, 101 L.Ed.2d at 457.

In the present matter, the military contractor's defense applies as a "significant conflict" exists between the federal government's interest in developing nuclear missile systems and the application of California tort law.

C. THE MILITARY CONTRACTOR'S DEFENSE APPLIES TO DEFENDANT'S PRODUCT

1. *Defendant's Product was Produced and Supplied Pursuant to Precise Government Specifications*

US Polymeric, BP CHEMICALS' predecessor, produced an asbestos containing ablative tape, that was supplied to plaintiff ROBERT GAYLORD's employer, Kaiser Aerospace, for use in the construction of missile parts under contract with the federal government. This ablative tape had no commercial application. It was supplied exclusively for use on military projects.

The ablative tape supplied by US Polymeric was produced in strict compliance with federal military specifications. The specifications required extremely precise manufacturing processes and required that the final product be subjected to rigorous testing. The military conducted laboratory and field tests of US Polymeric's product over

one hundred times before approving the product and placing it on the government's qualified products list for a particular missile system. If a product was not on the government's qualified products list, it could not be used.

Pursuant to government requirements, Kaiser Aerospace was obligated to order materials from suppliers on the government's qualified products list. Neither US Polymeric nor Kaiser Aerospace could exercise their discretion to choose an alternative product or deviate from the military specifications.

Under similar circumstances, the United States District Court for the Southern District of Illinois in *Niemann v. McDonnell Douglas Corp.*, 721 F.Supp. 1019 (S.D. Ill 1989) held that defendant's use of government specified asbestos-coated cloth in the manufacture of military aircraft pre-empted state tort law. The court held that the military's incorporation of the asbestos product into the design of the aircraft was discretionary and qualified it as "military equipment." *Id.*, at 1023. The court found that the government's use of the asbestos cloth in the manufacture of the aircraft for its "valuable heat resistance" qualities, established, as a matter of law, the existence of reasonably precise specifications satisfying the first prong of the *Boyle* test.

In the instant case US Polymeric supplied the ablative tape pursuant to precise government specifications. These specifications were promulgated and issued as part of the government's discretionary function in the development of nuclear missiles.

2. *It is Undisputed that Defendant's Product Conformed to Government Specifications*

The fact that US Polymeric's ablative tape was placed on the government's qualified products list establishes that it met the military specifications. Once US Polymeric's product was delivered, Kaiser Aerospace had a certain time

period in which to inspect the material and return it if any defects were discovered. Kaiser Aerospace had to inspect and accept the tape before it was processed and sent to GAYLORD for machining. It is undisputed that US Polymeric's product conformed to government specifications.

3. *The Government Had Knowledge of the Dangers of Asbestos Prior to Defendant So Defendant Had No Duty to Warn the Government*

The final element of the military contractor's defense, requires the contractor to warn the government about dangers known to the contractor but not the government. US Polymeric was not aware that asbestos was dangerous until the late 1960's or early 1970's when it received notification from the government. Plaintiffs' "state of the art" expert, Dr. Richard Cohen, testified in deposition and is expected to testify at trial that the military was well aware that asbestos caused disease in approximately 1947.

Dr. Cohen's testimony is consistent with the court's findings in *Niemann v. McDonnell Douglas Corp.*, *supra*, that the federal government was aware of the dangers of asbestos in the late 1940's to mid-1950's, the relevant times when asbestos was used in that case. *Niemann, supra,* 721 F.Supp. at 1028.

The *Niemann* Court held that the third element of the *Boyle* test (that the supplier must have had superior knowledge to the government) was satisfied, stating:

> The fact that the defendants had no actual knowledge of the risks of asbestos, while the government was already fully aware of the risks, satisfies the third element of the government contractor defense. *Niemann, supra,* 721 F.Supp. at 1028 [citations omitted].

D. THE MILITARY CONTRACTOR'S DEFENSE PRE-EMPTS EACH OF PLAINTIFFS' CAUSES OF ACTION

Plaintiffs' assert causes of action for negligence, defective design and failure to warn. As will appear below, each of these causes of action are pre-empted by the military contractor's defense.

1. *Plaintiffs' Cause of Action for Negligence is Barred by the Military Contractor's Defense*

The military contractor's defense applies to causes of action for negligence. *Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019 (S.D. Ill 1989) [the military contractor's defense was applicable and proven as to plaintiffs' claim for negligence against defendant military aircraft manufacturer]; *In re Agent Orange Product Liability Litigation,* 506 F.Supp. 762 (E.D. NY 1980), *rev.* on other grounds, 635 F.2d 987, *cert. den.*, 465 U.S. 1067 [Vietnam veterans and members of their families filed claims for injuries suffered as a result of being exposed to Agent Orange; the court held that government contract defense existed and had possible application to the lawsuit but that summary judgment was not appropriate].

Under California law, actionable negligence requires the following: (1) a legal duty to use due care; (2) a breach of this legal duty; and, (3) the breach is the proximate or legal cause of the resulting injury. *See Clarke v. Hoek* (1985) 174 Cal.App. 3d 208, 213, 219 Cal.Rptr. 845; BAJI No. 3.00 (7th ed. 1986). In the usual negligence case the elements of due care and proximate cause present questions of fact for the jury. *See Werum v. RKO General* (1975) 15 Cal.3d 40, 46, 123 Cal.Rptr. 468. The general duty to exercise due care is evaluated by a jury from the perspective of the "ordinary prudent or reasonable person" standard. BAJI NO. 3.10 (7th ed. 1986). "Ordinary or reasonable

care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence." *Id.*

In the present action, US Polymeric was required to strictly comply with government specifications when fabricating its asbestos-containing ablative tape, with no discretion to deviate from those requirements. The application of California's reasonable persons standard to evaluate whether US Polymeric acted negligently when supplying a government-specified product, places California state tort law in conflict with the federal government's interest in obtaining the specified military product. Plaintiffs' cause of action for negligence, therefore, must be pre-empted by the military contractor's defense.

2. The Military Contractor's Defense Pre-empts Plaintiffs' Cause of Action For Defective Design

The military contractor's defense applies to causes of action for strict products liability. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 101 L.Ed.2d 442 (1988); *In re Related Asbestos Cases*, 543 F.Supp. 1142 (N.D. Cal. 1982) [government contractor's defense may be asserted in asbestos-related product liability action involving insulators and workers employed by the Navy]; *Niemann v. McDonnell Douglas Corp.*, 721 F.Supp. 1019 (S.D. Ill 1989) [government contractor's defense applies to products liability claims where defendant manufactured an aircraft with asbestos-containing components]; *Ramey v. Martin-Baker Aircraft Co., Ltd.*, 874 F.2d 946 (4th Cir. 1989) [summary judgment affirmed for defendant aircraft ejection seat manufacturer against plaintiff aircraft mechanic on the basis of the military contractor defense]; *Garner v. Santoro*, 865 F.2d 629 (5th Cir. 1989) [defendant manufacturer of epoxy paint was entitled to assert government contractor defense in strict liability action brought by spray painter];

and, *McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203, 195 Cal.Rptr. 764 [court concluded it was reversible error not to permit defendant helicopter manufacturer to assert defense to strict products liability claim].

California law provides that a manufacturer is strictly liable in tort when he places an article on the market, knowing that it is to be used without inspection for defects, and proves to have a defect that causes injury. *Greenman v. Yuba Power Products* (1963) 59 Cal.2d 57, 62, 27 Cal.Rptr. 697.

In *Barker v. Lull Engineering Co., Inc.* (1978) 20 Cal.3d 413, 143 Cal.Rptr. 225, 226, the California Supreme Court held that a product may be found defective in design if the plaintiff establishes that it failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Alternatively, a product "may be found defective in design if the plaintiff demonstrates that its design proximately caused his injury and defendant fails to establish, in light of relevant factors, that, on balance, the benefits of the challenged designed outweigh the risk of danger inherent therein." *Barker v. Lull Engineering Co., Inc.* (1978) 20 Cal.3d 413, 143 Cal.Rptr. 225, 226.

California state law imposes a duty that conflicts with US Polymeric's obligation to strictly follow government specifications. The United States Supreme Court held in *Boyle* that "liability for design defects in military equipment cannot be imposed, pursuant to state law" when the three-part test is satisfied. *Boyle, supra,* 487 U.S. at 512, 101 L.Ed.2d at 458. In choosing an asbestos containing-containing ablative tape for use in nuclear missile systems, the government is authorized to balance "the technical, military and even social considerations, including specifically the trade-off between greater safety and greater combat effec-

tiveness." *Boyle, supra,* 487 U.S. at 511. A direct conflict arises between the government's interest in obtaining the specified product and California law that imposes a duty on US Polymeric to make the product in conformity with the consumer expectation or risk-benefit tests of *Barker v. Lull.*

3. The Military Contractor's Defense Bars Plaintiffs' Cause of Action for Failure to Warn

The military contractor's defense applies to causes of action for failure to warn. *Niemann v. McDonnell Douglas Corp.,* 721 F.Supp. 1019 (S.D. Ill 1989) [the government contractor's defense was applicable and proven as to both claims for negligence and failure to warn]; *Nicholson v. United States,* 697 F.Supp. 598 (D.CONN 1988) [government contractor defense barred plaintiff's failure to warn claim because to find liability would have "same negative effect" as outlined in Supreme Court's *Boyle* decision].

Under California law, to establish a failure to warn claim, plaintiff must prove: (1) that the manufacturer knew, or should have known of the risk inherent in the product; (2) that there was no warning or that the warning provided was inadequate; (3) the absence of a proper warning made the product unreasonably dangerous; *and,* (4) the failure to warn was the proximate cause of plaintiff's injury. *See Burke v. Almaden Vineyards, Inc.* (1978) 86 Cal.App.3d 768, 150 Cal.Rptr. 419.

California state law poses a "significant conflict" with the federal government's decision (and ability) to select an asbestos-containing ablative tape for use in a military missile system.

For example, the 1988 *Nicholson* decision, applying *Boyle* in a failure to warn case, held:

> The government contractor defense grew out of the historic principle of sovereign immunity. When a con-

> tractor acts under the authority and control of the United States, it shares in the immunity enjoyed by the government. [Citation omitted.] the defense promotes the federal interest in military procurement and protects the government officers in making military judgments about the design of equipment. *Nicholson v. United Technologies Corp.,* 697 F.Supp. 598, 603 (D.CONN 1988).

Niemann v. McDonnell Douglas Corp., 721 F.Supp. 1019 (S.D.Ill. 1989) also held that the military contractor's defense was applicable to failure to warn claims involving the use of asbestos in military aircraft. The *Niemann* court stated that:

> The *liability for failure to warn* as asserted herein, i.e., *that the contractors failed to warn the government about the hazards of asbestos in military equipment, 'would have had the same negative effect on military procurement as outlined in Boyle* [citation omitted]. Further, the government's decision on the contents of [the aircraft in question] involves the same balancing of technical, military and even social considerations protected in *Boyle* [citation omitted].' *Niemann, supra,* 721 F.Supp. at 1025, *citing Nicholson v. United Technologies Corp.,* 697 F.Supp. 598, 604 (D.Conn. 1988). [Emphasis added.]

Holding that state law must be displaced, the *Niemann* court analyzed that implementation of state law that would hold a government contractor liable for utilizing asbestos (as required by the government contract), placing the contractor in a paradoxical position bound by contradictory and opposite liability theories. *Niemann, supra,* 721 F.Supp. at 1023. Further, the "decision to use asbestos tape in the aircraft is clearly a discretionary decision of the government." *Id.; see Fairchild Republic Company v. United States and the Department of the Air Force,* 712 F.Supp. 711

(S.D.Ill. 1988). Therefore, under the *Boyle* decision, the use of the asbestos strips in particular aircraft falls within the government contractor defense in that the decision by the government to use the asbestos was a discretionary function. *Niemann, supra,* 721 F.Supp. at 1023-1024.

In *Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 273 Cal.Rptr. 214, the court held that defendant paint manufacturer was aware of the dangers associated with its product and could have satisfied its obligations under the military contract and still placed a warning on the product that would reach the end user. The court refused, as a matter of law, to find that the warning was adequate.

In the present case, the military specifications did, however, preclude US Polymeric from placing a warning on the ablative tape. The specifications state that the tape must be free of flaws. Attaching a warning label or imprinting a warning on the ablative tape would have violated the government specifications. Placing a warning on the packaging would have been ineffective. Plaintiff has testified in deposition that he never saw the packaging for the ablative tape. The tape was removed from the package and attached to the missile components before it ever reached his work area.

Under California law, US Polymeric is required to warn the user of the product of all scientifically and medically known or knowable hazards. *Anderson v. Owens-Corning Fiberglass* (1991) 53 Cal.3d 987, 281 Cal.Rptr. 528; BAJI No. 9.00.7. This duty is substantially higher than US Polymeric's duty under the federal common law to warn the government of known dangers. If the California duty was imposed on all government contractors, it would delay the government's ability to develop weapons and wage war. Each military contractor would have to research and discover all scientifically and medically knowable hazards and issue a warning to both the government and the end user before providing the government-specified product. Thus, a

conflict exists between the government's interest in obtaining US Polymeric's product for the expeditious production of nuclear missiles and US Polymeric's state law duty to warn.

III

CONCLUSION

Based upon the foregoing, defendant BP CHEMICALS respectfully requests that its motion for a directed verdict be granted as to each of plaintiffs' causes of action.

DATED: June 12, 1992

KENNEY, BURD, KNUTSON
& MARKOWITZ

By: /s/ JEFFERY J. FADEFF
Jeffery J. Fadeff
Attorneys for Defendant
BP Chemicals (HITCO) Inc.

APPENDIX 7

THE FAILURE TO GAIN THE KNOWLEDGE MAY BE NEGLIGENT, ARGUABLY GROSSLY NEGLIGENT, BUT IT DOES NOT RISE TO THE LEVEL OF MALICE, MALICIOUS, REPREHENSIBLE, DESPICABLE CONDUCT.

I AM GRANTING THE MOTION OF MR. FADEFF.

MS. JONAS: JUST FOR THE RECORD, YOUR HONOR, COULD I STATE THAT THE LAW IS CLEAR THAT IT'S VERY HARD FOR PLAINTIFFS TO ESTABLISH INTENTIONAL CONDUCT?

THE COURT: THERE ARE MANY DEFENDANTS THAT YOU SUE ROUTINELY, AND I HAVE TRIED THOSE CASES IN WHICH ACTUAL KNOWLEDGE IS PROVEN. AND AS TO THOSE DEFENDANTS THE MATTER OF MALICE GOES TO THE JURY, NOT IN THIS CASE. THERE IS NO EVIDENCE OF ACTUAL KNOWLEDGE.

NEXT?

MR. FADEFF: THE NEXT MOTION, YOUR HONOR, HAS TO DO WITH DEFENDANT'S REQUEST FOR A DIRECTED VERDICT WITH RESPECT TO THE MILITARY CONTRACTOR'S DEFENSE ON TWO CAUSES OF ACTION: NEGLIGENCE AND DESIGN DEFECT.

UNDER THE BOYLE TEST THERE IS A DIFFERENT STANDARD FOR FAILURE TO WARN, BUT THERE IS NOT A REQUIREMENT THAT A WARNING — THAT THE DEFENDANT ESTABLISH THAT THEY WERE PRECLUDED FROM PUTTING A WARNING ON THE PACKAGE AS FAR AS A DESIGN DEFECT OR A NEGLIGENCE CLAIM.

SO, ON THAT BASIS THE EVIDENCE WAS INTRODUCED THAT THE PRODUCT MET THE BOYLE THREE-PRONG TEST: THAT THE PRODUCT WAS MADE ACCORDING TO GOVERNMENT SPECIFICATIONS, THAT IT SATISFIED THOSE SPECIFICATIONS, AND THAT THE DEFENDANT DID NOT HAVE KNOWLEDGE SUPERIOR TO THE U.S. GOVERNMENT AS TO THE DANGERS OF THE HAZARDS ASSOCIATED WITH THE PRODUCT.

THE COURT: THAT IS NOT THE TEST APPLIED IN CALIFORNIA.

MISS JONAS?

MS. JONAS: YES, YOUR HONOR. I BELIEVE — I WOULD ACTUALLY LIKE TO CROSS-MOVE FOR A DIRECTED VERDICT ON THE AFFIRMATIVE DEFENSE OF MILITARY CONTRACTOR FOR SEVERAL REASONS:

ONE, THIS IS NOT MILITARY EQUIPMENT, IT'S EQUIPMENT THAT HAD BEEN USED IN THE COMMERCIAL MARKET SINCE THE 1950'S ACCORDING TO THE PERSON WHO HAS KNOWLEDGE, DON BECKLEY, WHO TESTIFIED YESTERDAY.

SECONDLY, THEY DIDN'T MEET THEIR BURDEN OF PROOF SHOWING SUPERIOR KNOWLEDGE OF THE UNITED STATES.

AND, THIRDLY, AND I THINK VERY IMPORTANTLY, THERE IS NO CONFLICT HERE IN THE ABILITY OF BP CHEMICALS TO HAVE ISSUED WARNINGS UNDER JACKSON VERSUS DEFT AND THE RECENT KAIU OPINION.

MR. FADEFF: THE DEFT V JACKSON CASE WAS A STRICT PRODUCTS LIABILITY FAILURE TO WARN CLAIM, AND IT ADDRESSED THAT CLAIM ONLY, AND THAT THE DESIGN DEFECT AND THE NEGLIGENCE CAUSES OF ACTION WERE NOT RAISED.

THAT THE STANDARD THAT WAS BEING ADDRESSED IN JACKSON V DEFT WAS A PRODUCT MANAGER THAT WAS AWARE OF THE HAZARDS AND HAD PREVIOUSLY GIVEN A MORE DETAILED WARNING, AND THEN WITH THEIR WARNING REDUCED THE SPECIFICITY OF THE WARNING BECAUSE THAT'S ALL THE GOVERNMENT REQUIRED IN ITS PACKAGING AND LABELING REQUIREMENT THAT, AS A MATTER OF LAW, THAT WAS NOT — THAT DEFENDANT WAS NOT ENTITLED TO SUMMARY JUDGMENT.

AND SO I — AGAIN, IT'S DEFENDANT'S POSITION THAT THAT CASE ONLY HAS TO DO WITH PLAINTIFF'S CAUSE OF ACTION FOR FAILURE TO WARN, AND THAT THE BOYLE STANDARD IS STILL APPLICABLE AS TO A DESIGN DEFECT AND A NEGLIGENCE CAUSE OF ACTION.

THE COURT: SUBMITTED?

MR. FADEFF: YES, YOUR HONOR.

MS. JONAS: YES.

THE COURT: THE MOTION FOR DIRECTED VERDICT IN FAVOR OF THE MILITARY CONTRACT DEFENSE IS DENIED.

NOW, LET'S TURN TO THE MOTION OF MISS JONAS FOR A DIRECTED VERDICT THAT THE

GOVERNMENT CONTRACTOR DEFENSE DOES NOT APPLY.

WHAT BOTHERS ME THE MOST ABOUT THIS IS THE TESTIMONY OF YOUR WITNESS YESTERDAY — WHAT WAS HIS NAME?

MR. FADEFF: BECKLEY.

THE COURT: MR. BECKLEY, THAT THIS WAS A PREEXISTING OFF-THE-SHELF PRODUCT THAT WAS AVAILABLE TO THE COMMERCIAL AIRCRAFT INDUSTRY. HOWEVER MUCH HE MAY OR MAY NOT HAVE SOLD TO THE COMMERCIAL AIRCRAFT INDUSTRY I THINK IS BESIDE THE POINT.

THIS IS NOT A PRODUCT THAT WAS DESIGNED TO MILITARY SPECIFICATIONS. IT WAS A PRODUCT THAT EXISTED THAT WOULD FIT THE MILITARY SPECIFICATIONS FOR THE USE DESIRED FOR THE MISSILE PROGRAM.

THE CASE OF — I DON'T KNOW HOW TO PRONOUNCE IT — KAIU, K-A-I-U, VERSUS RAYMARK INDUSTRIES, A NINTH CIRCUIT CASE, MARCH 31ST, 1992, CORRECTLY SETS FORTH THAT — AND I QUOTE:

WHERE THE GOODS ORDERED BY THE MILITARY ARE THOSE READILY AVAILABLE IN SUBSTANTIALLY SIMILAR FORM TO USERS, THE MILITARY CONTRACTOR DEFENSE DOES NOT APPLY.

HOW DO YOU RESPOND TO THAT?

MR. FADEFF: ON A COUPLE OF BASES, YOUR HONOR. UNDER DEFT V JACKSON, THE

COURT SAID THE FACT THAT THE PRODUCTS HAD A COMMERCIAL APPLICATION AS WELL AS A MILITARY APPLICATION DID NOT PRECLUDE THE ASSERTION OF THE MILITARY CONTRACTORS DEFENSE AND THAT WAS A LIQUID — IT WAS A PAINT TYPE OF A PRODUCT THAT WAS USED ON NAVAL SHIPS.

WHAT WE HAVE HERE IS A PRODUCT THAT THE GOVERNMENT DID ISSUE SPECIFICATIONS, AND THE PRODUCT HAD TO UNDERGO EXHAUSTIVE TESTING BY THE GOVERNMENT TO SHOW THAT IT WAS ABLE TO MEET THE GOVERNMENT STANDARDS. MR. BECKLEY TESTIFIED THAT THERE WAS, ON AVERAGE —

THE COURT: THAT'S THE CASE ANY TIME THERE IS PIPE WRAPPING OR ANY OTHER OFF-THE-SHELF PRODUCT THAT'S — THAT WAS USED BY THE NAVY DURING THE SAME PERIOD. THOSE OFF-THE-SHELF PRODUCTS ALSO MET THE MILITARY SPECIFICATIONS, AND TO THOSE PRODUCTS IT'S WELL SETTLED THAT THE MILITARY CONTRACTOR DEFENSE DOES NOT APPLY.

MR. FADEFF: LET ME JUST ADD, YOUR HONOR, THE TESTIMONY YESTERDAY WAS THAT THERE WERE OVER A HUNDRED TEST FIRINGS OF THE ROCKETS USING THESE, THAT THIS PRODUCT WAS ONLY QUALIFIED ON TWO OF ALL THE PROJECTS THAT WERE OVER AT KAISER AEROSPACE, THAT ON CERTAIN PROJECTS IT HAD NOT BEEN QUALIFIED.

PERHAPS IT WASN'T BROUGHT OUT AS CLEARLY, BUT CERTAINLY THIS PRODUCT WAS

SUBMITTED AND DID NOT QUALIFY ON SOME OF THOSE PRODUCTS. THIS WAS NOT AN OFF-THE-SHELF ITEM WHICH COULD JUST MEET ANY ONE OF THOSE APPLICATIONS.

THE COURT: IT WAS AN OFF-THE SHELF ITEM THOUGH. THE FACT THAT IT DIDN'T MEET ALL THE SPECIFICATIONS IN EVERY CASE DOES NOT CHANGE THAT FACT. THAT'S WHAT THE WITNESS SAID YESTERDAY. HE SAID IT WAS A PREEXISTING PRODUCT, WHICH HE FELT COULD FILL THE MILITARY NEED. AND IN SOME RESPECTS, IT WAS ABLE TO DO SO AND IN SOME RESPECTS IT WAS NOT.

MS. JONAS: YOUR HONOR, COULD I ADD ONE THING? HE REFERRED TO THE JACKSON VERSES DEFT OPINION, THE INCIDENTAL COMMERCIAL USE. I THINK WAS CONTEMPLATED THERE IF YOU HAVE A PRODUCT THAT'S DEVELOPED FOR MILITARY PURPOSES AND THEN YOU GO OUT AND SELL —

THE COURT: THE FACT IT ALSO HAS COMMERCIAL —

MS. JONAS: THAT WOULD NOT NECESSARILY BAR YOU FROM RAISING THAT DEFENSE. IT DID NOT CONTEMPLATE A PREEXISTING PRODUCT.

THE COURT: THE FACT IS, BEFORE THE MILITARY USE WAS CONTEMPLATED, THE PRODUCT EXISTED AND WAS IN THE INVENTORY OF YOUR CLIENT.

MS. JONAS: AND WENT TO THE SHAW OF IRAN.

THE COURT: THERE IS I THINK AN ISSUE REGARDING THE CONFLICT BETWEEN THE MILITARY SPECIFICATION AND THE ABILITY TO ADEQUATELY WARN, AND THAT ISSUE WOULD BE WHETHER WARNING ON THE PACKAGING WOULD BE AN ADEQUATE WARNING.

I EXPECT TO HEAR A LOT ABOUT THAT IN MR. FADEFF'S CLOSING ARGUMENT REGARDLESS OF HOW I RULE ON THIS PARTICULAR MOTION.

IT IS CLEAR TO ME FROM THE EVIDENCE THAT THE MILITARY SPECIFICATION, PRECLUDING AN ACTUAL WARNING ON THE PRODUCT ITSELF, BUT I CANNOT RECONCILE THE TESTIMONY I HEARD YESTERDAY WITH THE AVAILABILITY OF THE MILITARY CONTRACTOR DEFENSE BECAUSE IT WAS A PREEXISTING INVENTORY PRODUCT OF THE DEFENDANT.

IS THE MATTER SUBMITTED?

MS. JONAS: YES, YOUR HONOR.

MR. FADEFF: YES, YOUR HONOR.

THE COURT: ALL RIGHT. MR. FADEFF, I'M AFRAID THAT I AM GOING TO GRANT THE MOTION OF MISS JONAS. THE MILITARY CONTRACTOR DEFENSE DOES NOT APPLY HERE.

MS. JONAS: YOUR HONOR, YOU RAISED A POINT I WANTED TO RESPOND TO THAT MR. FADEFF WOULD ARGUE IN CLOSING ARGUMENT THE EFFECTIVENESS OF WARNINGS.

I BELIEVE EFFECTIVENESS OF WARNING IS A FACT FOR EXPERT TESTIMONY. A HUMAN

APPENDIX 8

FACTOR WOULD HAVE TO TALK ABOUT WHETHER THIS COULD GET —

THE COURT: I DISAGREE. UNDER THE FACTS OF THIS CASE I THINK IT'S A JURY QUESTION. ANY WARNING ON THE PACKAGING, AS REMOTE AS IT MIGHT HAVE ARGUABLY BEEN, FROM THE PLAINTIFF'S USE HERE, WOULD HAVE BEEN EFFECTIVE AT ALL. IT'S UP TO THE JURY.

YOUR NEXT MOTION?

MR. FADEFF: I BELIEVE THAT'S ALL I HAD, YOUR HONOR. WE ARE ASSERTING THE SUPERSEDING CAUSE. THERE WAS A BRIEF ON THAT JUST EXPLAINING WHY IT WAS APPLICABLE. AND I BELIEVE PLAINTIFF'S MOTION IS TO PRECLUDE INSTRUCTING THE JURY ON THAT.

THE COURT: I WILL TURN TO THAT MOTION NOW.

MISS JONAS, YOU HAVE A MOTION IN LIMINE TO EXCLUDE EVIDENCE ON CONDUCT OF KAISER AEROSPACE AS A SUPERSEDING AND PROXIMATE CAUSE?

MS. JONAS: THAT'S CORRECT.

THE COURT: WOULD YOU LIKE TO SPEAK TO THAT?

THE COURT: LADIES AND GENTLEMEN OF THE JURY:

IT IS NOW MY DUTY TO INSTRUCT YOU IN THE LAW THAT APPLIES TO THIS CASE. IT IS YOUR DUTY TO FOLLOW THE LAW.

AS JURORS IT IS YOUR DUTY TO DETERMINE THE EFFECT AND VALUE OF THE EVIDENCE AND TO DECIDE ALL QUESTIONS OF FACT.

YOU MUST NOT BE INFLUENCED BY SYMPATHY, PREJUDICE OR PASSION.

YOU MUST DECIDE ALL QUESTIONS OF FACT IN THIS CASE FROM THE EVIDENCE RECEIVED IN THIS TRIAL AND NOT FROM ANY OTHER SOURCE. YOU MUST NOT MAKE ANY INDEPENDENT INVESTIGATION OF THE FACTS OR THE LAW OR CONSIDER OR DISCUSS FACTS AS TO WHICH THERE IS NO EVIDENCE.

THIS MEANS, FOR EXAMPLE, THAT YOU MUST NOT ON YOUR OWN VISIT THE SCENE, CONDUCT EXPERIMENTS, OR CONSULT REFERENCE WORKS FOR ADDITIONAL PAL INFORMATION.

EVEN IF ANY MATTER IS REPEATED OR STATED IN DIFFERENT WAYS IN THESE INSTRUCTIONS, I DO NOT INTEND ANY EMPHASIS ON IT. YOU MUST NOT SINGLE OUT ANY INDIVIDUAL RULE OR INSTRUCTION AND IGNORE THE OTHERS. INSTEAD, YOU MUST CONSIDER ALL THE INSTRUCTIONS AS A WHOLE AND MUST REGARD EACH IN LIGHT OF THE OTHERS.

THE ORDER IN WHICH THE INSTRUCTIONS ARE GIVEN HAS NO SIGNIFICANCE AS TO THEIR RELATIVE IMPORTANCE.

STATEMENTS OF COUNSEL ARE NOT EVIDENCE. HOWEVER, IF COUNSEL HAVE STIPULATED TO A FACT, OR ONE HAS BEEN

ADMITTED BY COUNSEL, YOU MUST TREAT THAT FACT AS HAVING BEEN CONCLUSIVELY PROVED.

YOU MAY NOT SPECULATE AS TO THE ANSWERS TO QUESTIONS WHICH — TO WHICH OBJECTIONS WERE SUSTAINED OR AS TO THE REASONS FOR THE OBJECTIONS.

YOU MUST NOT CONSIDER ANY EVIDENCE THAT WAS STRICKEN. THAT MUST BE TREATED AS THOUGH YOU HAD NEVER KNOWN OF IT.

A SUGGESTION IN A QUESTION IS NOT EVIDENCE UNLESS IT IS ADOPTED BY THE ANSWER. STANDING ALONE, A QUESTION IS NOT EVIDENCE. YOU MAY CONSIDER IT ONLY TO THE EXTENT IT IS ADOPTED BY THE ANSWER.

THE FACT THAT A CORPORATION IS A PARTY MUST NOT PREJUDICE YOU IN YOUR DELIBERATIONS OR IN YOUR VERDICT.

YOU MAY NOT DISCRIMINATE BETWEEN A CORPORATION AND NATURAL INDIVIDUALS. EACH IS A PERSON IN THE EYES OF THE LAW. EACH IS ENTITLED TO THE SAME FAIR AND IMPARTIAL CONSIDERATION AND TO JUSTICE BY THE SAME LEGAL STANDARDS.

THE PRONOUN FORM AS USED IN THESE INSTRUCTIONS, IF APPLICABLE IS SHOWN BY THE TEXT OF THE INSTRUCTION AND THE EVIDENCE, APPLIES TO A CORPORATION OR PUBLIC ENTITY OR BUSINESS ASSOCIATION.

EVIDENCE MAY BE EITHER DIRECT OR CIRCUMSTANTIAL. DIRECT EVIDENCE PROVES A

FACT WITHOUT AN INFERENCE AND, IF TRUE, CONCLUSIVELY ESTABLISHES THAT FACT. CIRCUMSTANTIAL EVIDENCE PROVES A FACT FROM WHICH AN INFERENCE OF THE EXISTENCE OF ANOTHER FACT MAY BE DRAWN.

AN INFERENCE IS A DEDUCTION OF FACT THAT MAY LOGICALLY AND REASONABLY BE DRAWN FROM ANOTHER FACT OR GROUP OF FACTS.

THE LAW MAKES NO DISTINCTION BETWEEN DIRECT AND CIRCUMSTANTIAL EVIDENCE AS TO THE DEGREE OF PROOF REQUIRED. EACH IS A REASONABLE METHOD OF PROOF. EACH IS RESPECTED FOR SUCH CONVINCING FORCE AS IT MAY CARRY.

YOU ARE NOT BOUND TO DECIDE ACCORDING TO THE TESTIMONY OF A NUMBER OF WITNESSES, WHICH DOES NOT CONVINCE YOU, AS AGAINST THE TESTIMONY OF A SMALLER NUMBER OR OTHER EVIDENCE, WHICH IS MORE CONVINCING TO YOU.

THE TESTIMONY OF ONE WITNESS WORTHY OF BELIEF IS SUFFICIENT TO PROVE ANY FACT. THIS DOES NOT MEAN THAT YOU ARE FREE TO DISREGARD THE TESTIMONY OF ANY WITNESS MERELY FROM CAPRICE OR PREJUDICE, OR FROM A DESIRE TO FAVOR EITHER SIDE. IT DOES MEAN THAT YOU MUST NOT DECIDE ANYTHING BY SIMPLY COUNTING THE NUMBER OF WITNESSES WHO HAVE TESTIFIED ON THE OPPOSING SIDES. THE TEST IS NOT THE NUMBER OF WITNESSES, BUT THE CONVINCING FORCE OF THE EVIDENCE.

LAURIE WARNER, CSR NO. 4735

IF WEAKER AND LESS SATISFACTORY EVIDENCE IS OFFERED BY A PARTY, WHEN IT WAS WITHIN HIS POWER TO PRODUCE STRONGER AND MORE SATISFACTORY EVIDENCE, THE EVIDENCE OFFERED SHOULD BE VIEWED WITH DISTRUST.

IF YOU SHOULD FIND THAT A PARTY WILLFULLY SUPPRESSED EVIDENCE IN ORDER TO PREVENT ITS BEING PRESENTED IN THIS TRIAL, YOU MAY CONSIDER THAT FACT IN DETERMINING WHAT INFERENCES TO DRAW FROM THE EVIDENCE.

IN DETERMINING WHAT INFERENCES TO DRAW FROM THE EVIDENCE YOU MAY CONSIDER, AMONG OTHER THINGS, A PARTY'S FAILURE TO EXPLAIN OR DENY SUCH EVIDENCE.

TESTIMONY HAS BEEN READ FROM A DEPOSITION. A DEPOSITION IS TESTIMONY TAKEN UNDER OATH BEFORE THE TRIAL AND PRESERVED IN WRITING. YOU MUST CONSIDER THAT TESTIMONY AS IF IT HAD BEEN GIVEN HERE IN COURT.

AN INTERROGATORY IS A WRITTEN QUESTION ASKED BY ONE PARTY OF ANOTHER, WHO MUST ANSWER IT UNDER OATH IN WRITING. YOU MUST CONSIDER INTERROGATORIES AND THE ANSWERS THERETO JUST AS IF THE QUESTIONS HAD BEEN ASKED AND ANSWERED HERE IN COURT.

ROBERT GAYLORD IS PROCEEDING ON TWO THEORIES OF LIABILITY. THE FACTS THAT HE

MUST PROVE ARE DIFFERENT DEPENDING ON THE THEORY.

THE PLAINTIFF HAS THE BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THE FACTS NECESSARY TO ESTABLISH:

ONE, STRICT PRODUCTS LIABILITY FOR A DESIGN DEFECT;

AND, TWO, STRICT PRODUCTS LIABILITY FOR FAILURE TO WARN.

IF THE PLAINTIFF MEETS HIS BURDEN OF PROOF UNDER ONE OR BOTH OF THESE THEORIES, HE IS ENTITLED TO RECOVER.

THE DEFENDANT HAS THE BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE ALL OF THE FACTS NECESSARY TO ESTABLISH EACH OF AFFIRMATIVE DEFENSES WHICH ARE RAISED TO EACH OF THE CAUSES OF ACTION ALLEGED, INCLUDING:

ONE, CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF;

AND, TWO, EXTRAORDINARY UNFORESEEABLE SUPERSEDING NEGLIGENCE OF PLAINTIFF'S EMPLOYER;

AND, THREE, COMPARATIVE FAULT OF ANY OTHER PARTIES OR ENTITIES.

IF THE DEFENDANT MEETS ITS BURDEN OF PROOF UNDER THE THEORY OF PLAINTIFF'S EMPLOYER'S EXTRAORDINARY UNFORESEEABLE SUPERSEDING NEGLIGENCE, THEN PLAINTIFF IS NOT ENTITLED TO RECOVER.

PREPONDERANCE OF THE EVIDENCE MEANS EVIDENCE THAT HAS MORE CONVINCING FORCE THAN THAT OPPOSED TO IT. IF THE EVIDENCE IS SO EVENLY BALANCED THAT YOU ARE UNABLE TO SAY THAT THE EVIDENCE ON EITHER SIDE OF AN ISSUE PREPONDERATES, YOUR FINDING ON THAT ISSUE MUST BE AGAINST THE PARTY WHO HAD THE BURDEN OF PROVING IT.

YOU SHOULD CONSIDER ALL OF THE EVIDENCE BEARING UPON — SOMETHING WRONG WITH THIS. IT SHOULD SAY EACH ISSUE. OH, HERE IT IS.

YOU SHOULD CONSIDER ALL THE EVIDENCE BEARING UPON EVERY ISSUE REGARDLESS OF WHO PRODUCED IT.

A STIPULATION IS AN AGREEMENT AMONG COUNSEL AS TO MATTERS RELATING TO THE TRIAL.

COUNSEL HAVE STIPULATED TO CERTAIN MATTERS. YOU MUST CONSIDER THOSE MATTERS AS HAVING BEEN CONCLUSIVELY PROVED.

YOU ARE THE SOLE JUDGES — SOLE AND EXCLUSIVE JUDGES OF THE BELIEVABILITY OF THE WITNESSES.

IN DETERMINING THE BELIEVABILITY OF A WITNESS, YOU MAY CONSIDER ANY MATTER THAT HAS A TENDENCY IN REASON TO PROVE OR DISPROVE THE TRUTHFULNESS OF THE TES-

TIMONY OF THE WITNESS, INCLUDING BUT NOT LIMITED TO THE FOLLOWING:

THE DEMEANOR OF THE WITNESS WHILE TESTIFYING AND THE MANNER OF TESTIFYING;

THE CHARACTER OF THAT TESTIMONY;

THE EXTENT OF CAPACITY OF THE WITNESS TO PERCEIVE, TO RECOLLECT, OR TO COMMUNICATE ANY MATTER ABOUT WHICH THE WITNESS HAS TESTIFIED;

THE OPPORTUNITY OF THE WITNESS TO PERCEIVE ANY MATTER ABOUT WHICH THE WITNESS HAS TESTIFIED;

THE EXISTENCE OR NONEXISTENCE OF A BIAS, INTEREST, OR OTHER MOTIVE;

A STATEMENT PREVIOUSLY MADE BY THE WITNESS THAT IS CONSISTENT WITH THE TESTIMONY OF THE WITNESS;

A STATEMENT MADE BY THE WITNESS THAT IS INCONSISTENT WITH ANY PART OF THE TESTIMONY OF THE WITNESS;

THE EXISTENCE OR NONEXISTENCE OF ANY FACT TESTIFIED BY THE WITNESS;

THE ATTITUDE OF THE WITNESS TOWARD THE ACTION IN WHICH TESTIMONY HAS BEEN GIVEN BY THE WITNESS OR TOWARD THE GIVING OF TESTIMONY.

DISCREPANCIES IN A WITNESS' TESTIMONY OR BETWEEN SUCH WITNESS' TESTIMONY AND THAT OF OTHER WITNESSES, IF THERE WERE

ANY, DO NOT NECESSARILY MEAN SUCH WITNESS SHOULD BE DISCREDITED. FAILURE OF RECOLLECTION IS COMMON. INNOCENT MISRECOLLECTION IS NOT UNCOMMON. TWO PERSONS WITNESSING AN INCIDENT OR A TRANSACTION OFTEN WILL SEE OR HEAR IT DIFFERENTLY. WHETHER A DISCREPANCY PERTAINS TO AN IMPORTANT MATTER OR ONLY TO SOMETHING TRIVIAL SHOULD BE CONSIDERED BY YOU.

A WITNESS FALSE IN ONE PART OF HIS TESTIMONY IS TO BE DISTRUSTED IN OTHERS. YOU MAY REJECT THE ENTIRE TESTIMONY OF A WITNESS WHO WILLFULLY HAS TESTIFIED FALSELY ON A MATERIAL POINT, UNLESS, FROM ALL THE EVIDENCE, YOU BELIEVE THAT THE PROBABILITY OF TRUTH FAVORS HIS TESTIMONY IN OTHER PARTICULARS.

A STATEMENT MADE BY A PARTY BEFORE TRIAL WHICH TENDS TO PROVE OR DISPROVE ANY MATERIAL FACT IN THIS ACTION AND WHICH IS AGAINST SUCH PARTY'S INTEREST IS AN ADMISSION. EVIDENCE OF AN ORAL ADMISSION NOT MADE UNDER OATH OUGHT TO BE VIEWED WITH CAUTION.

A WITNESS WHO HAS SPECIAL KNOWLEDGE, SKILL, EXPERIENCE, TRAINING OR EDUCTION IN A PARTICULAR SUBJECT HAS TESTIFIED TO CERTAIN OPINIONS. IN DETERMINING WHAT WEIGHT TO GIVE EACH OPINION, YOU SHOULD CONSIDER THE QUALIFICATIONS AND BELIEVABILITY OF THE WITNESS, THE FACTS OR MATERIALS UPON

WHICH EACH OPINION IS BASED, AND THE REASONS FOR EACH OPINION.

AN OPINION IS ONLY AS GOOD AS THE FACTS AND REASONS ON WHICH IT IS BASED. IF YOU FIND THAT ANY SUCH FACT HAS NOT BEEN PROVED, OR HAS BEEN DISPROVED, YOU MUST CONSIDER THAT IN DETERMINING THE VALUE OF THE OPINION. LIKEWISE, YOU MUST CONSIDER THE STRENGTHS AND WEAKNESSES OF THE REASONS ON WHICH IT IS BASED.

YOU ARE NOT BOUND BY AN OPINION. GIVE EACH OPINION THE WEIGHT WHICH YOU FIND IT DESERVES.

HOWEVER, YOU MAY NOT ARBITRARILY OR UNREASONABLY DISREGARD THE EXPERT OPINION TESTIMONY IN THIS CASE WHICH WAS NOT CONTRADICTED. THEREFORE, UNLESS YOU FIND THAT IT IS NOT BELIEVABLE, IT IS CONCLUSIVE AND BINDING ON YOU.

IN RESOLVING THE CONFLICT IN THE TESTIMONY OF EXPERT WITNESSES, YOU SHOULD WEIGH THE OPINION OF ONE EXPERT AGAINST THAT OF ANOTHER. IN DOING THIS, YOU SHOULD CONSIDER THE QUALIFICATIONS AND BELIEVABILITY OF EACH WITNESS, THE REASONS FOR EACH OPINION, AND THE MATTER UPON WHICH IT IS BASED.

AN EXPERT WITNESS WAS ASKED TO ASSUME THAT CERTAIN FACTS WERE TRUE AND TO GIVE AN OPINION BASED UPON THAT ASSUMPTION. THIS IS A HYPOTHETICAL QUESTION. IF ANY FACT ASSUMED IN SUCH A

QUESTION HAS NOT BEEN ESTABLISHED BY THE EVIDENCE, YOU SHOULD DETERMINE THE EFFECT OF THAT OMISSION UPON THE VALUE OF AN OPINION BASED ON THAT FACT.

NEGLIGENCE IS THE DOING OF SOMETHING WHICH IS REASON — WHICH A REASONABLY PRUDENT PERSON WOULD NOT DO, OR THE FAILURE TO DO SOMETHING WHICH A REASONABLY PRUDENT PERSON WOULD DO, UNDER CIRCUMSTANCES SIMILAR TO THOSE SHOWN BY THE EVIDENCE.

IT IS THE FAILURE TO USE ORDINARY OR REASONABLE CARE.

ORDINARY OR REASONABLE COMPARE IS THAT CARE WHICH PERSONS OF ORDINARY PRUDENCE WOULD USE IN ORDER TO AVOID INJURY TO THEMSELVES OR OTHERS UNDER CIRCUMSTANCES SIMILAR TO THOSE SHOWN BY THE EVIDENCE.

YOU WILL NOTE THAT THE PERSON WHOSE CONDUCT WE SET UP AS A STANDARD IS NOT THE EXTRAORDINARILY CAUTIOUS INDIVIDUAL, NOR THE EXCEPTIONALLY SKILLFUL ONE, BUT A PERSON OF REASONABLE AND ORDINARY PRUDENCE.

ONE TEST THAT IS HELPFUL IN DETERMINING WHETHER OR NOT A PERSON WAS NEGLIGENT IS TO ASK AND ANSWER THE QUESTION WHETHER OR NOT, IF A PERSON OF ORDINARY PRUDENCE HAD BEEN IN THE SAME SITUATION AND POSSESSED OF THE SAME KNOWLEDGE, HE WOULD HAVE FORESEEN OR ANTICIPATED

THAT SOMEONE MIGHT HAVE BEEN INJURED BY OR AS A RESULT OF HIS ACTION OR INACTION IF THE ANSWER TO THAT QUESTION IS YES, AND IF THE ACTION OR INACTION REASONABLY COULD HAVE BEEN AVOIDED, THEN NOT TO AVOID IT WOULD BE NEGLIGENCE.

A LEGAL CAUSE OF INJURY, DAMAGE, LOSS OR HARM IS A CAUSE WHICH IS A SUBSTANTIAL FACTOR IN BRINGING ABOUT THE INJURY, DAMAGE, LOSS OR HARM.

A CAUSE IS A SUBSTANTIAL FACTOR IN BRINGING ABOUT THE INJURY, DAMAGE, LOSS OR HARM IF IT IS A REAL AND NOT INSIGNIFICANT FACTOR IN BRINGING ABOUT THE INJURY, DAMAGE, LOSS OR HARM.

TO BE A REAL AND NOT INSIGNIFICANT FACTOR MEANS THAT THE FACTOR IS NOT IMAGINARY OR ILLUSORY.

A FACTOR IS A SUBSTANTIAL FACTOR WITHOUT REGARD TO ITS RELATIVE SIZE OR AMOUNT. IT IS SUBSTANTIAL ONLY WITH REGARD TO ITS SIGNIFICANCE.

THERE MAY BE MORE THAN ONE LEGAL CAUSE OF AN INJURY. WHEN THE DEFECTIVE PRODUCT OR NEGLIGENCE OF TWO OR MORE PARTIES OR ENTITIES CONTRIBUTES CONCURRENTLY AS LEGAL CAUSES OF AN INJURY, THE DEFECTIVE PRODUCT OR NEGLIGENCE OF EACH OF SAID PARTY OR ENTITY IS A LEGAL CAUSE OF THE INJURY REGARDLESS OF THE EXTENT TO WHICH EACH CONTRIBUTES TO THE INJURY.

LAURIE WARNER, CSR NO. 4735

A CAUSE IS CONCURRENT IF IT WAS OPERATIVE AT THE MOMENT OF INJURY AND ACTED WITH ANOTHER CAUSE TO PRODUCE THE INJURY. IT IS NO DEFENSE THAT THE DEFECTIVE PRODUCT OF A PERSON NOT JOINED AS A PARTY WAS ALSO A LEGAL CAUSE OF THE INJURY.

HOWEVER, IF YOU FIND THAT THERE WAS COMPARATIVE FAULT ON THE PART OF OTHER PARTIES OR ENTITIES WHICH WAS A LEGAL CAUSE OF THE INJURY, SUCH COMPARATIVE FAULT MAY REDUCE THE DEFENDANT'S LIABILITY.

IF YOU FIND THAT BP CHEMICALS' CONDUCT WAS A SUBSTANTIAL FACTOR IN BRINGING ABOUT AN INJURY TO PLAINTIFF, BUT THAT THE IMMEDIATE CAUSE OF PLAINTIFF'S INJURY WAS THE EXTRAORDINARY, UNFORESEEABLE CONDUCT OF ANOTHER, THEN THIS CONDUCT OF ANOTHER IS A SUPERSEDING CAUSE OF PLAINTIFF'S INJURY AND B P CHEMICALS IS RELIEVED OF LIABILITY.

IF YOU FIND THAT DEFENDANT BP CHEMICALS SUPPLIED DEFECTIVE PRODUCTS, AND THAT SUCH DEFECTIVE PRODUCTS WERE A SUBSTANTIAL FACTOR IN BRINGING ABOUT AN INJURY TO THE PLAINTIFF, BUT THAT THE IMMEDIATE CAUSE OF THE INJURY WAS THE NEGLIGENT CONDUCT OF KAISER AEROSPACE, THE DEFENDANT BP CHEMICALS IS NOT RELIEVED OF LIABILITY FOR SUCH INJURY IF:

ONE, AT THE TIME OF SUCH CONDUCT BP CHEMICALS REALIZED OR REASONABLY

SHOULD HAVE REALIZED THAT KAISER AEROSPACE MIGHT SO ACT, OR THE RISK OF HARM SUFFERED WAS REASONABLY FORESEEABLE;

OR, TWO, A REASONABLE PERSON KNOWING THE SITUATION EXISTED AT THE TIME OF THE CONDUCT OF KAISER AEROSPACE WOULD NOT HAVE REGARDED IT AS HIGHLY EXTRAORDINARY THAT KAISER AEROSPACE HAD SO ACTED;

OR, THREE, IF THE CONDUCT OF KAISER AEROSPACE WAS NOT EXTRAORDINARILY NEGLIGENT AND WAS A NORMAL CONSEQUENCE OF THE SITUATION CREATED BY DEFENDANT BP CHEMICALS.

IN THIS CASE PLAINTIFF SEEKS TO ESTABLISH LIABILITY ON THE PART OF DEFENDANT ON ONE OR BOTH OF TWO DIFFERENT CLAIMED BASES OF RECOVERY.

THE FIRST IS THE CLAIM THAT THE PRODUCT IN QUESTION WAS DEFECTIVE. I AM NOW INSTRUCT ON THE LAW AS IT RELATES TO THE CLAIM OF A DEFECTIVE PRODUCT.

THE MANUFACTURER OR DISTRIBUTOR OF A PRODUCT IS LIABLE FOR INJURIES LEGALLY CAUSED BY A DEFECT IN ITS DESIGN WHICH EXISTED WHEN IT LEFT THE POSSESSION OF THE MANUFACTURER OR DISTRIBUTOR PROVIDED THAT THE INJURIES RESULTED FROM A USE OF THE PRODUCT THAT WAS REASONABLY FORESEEABLE BY THE MANUFACTURER OR DISTRIBUTOR.

A PRODUCT IS DEFECTIVE IN DESIGN IF THE PRODUCT FAILS TO PERFORM AS SAFELY AS AN ORDINARY CONSUMER WOULD EXPECT WHEN USED IN AN INTENDED OR REASONABLY FORESEEABLE MANNER.

PLAINTIFF'S SECOND CLAIM IS THAT THE PRODUCT IN QUESTION WAS DEFECTIVE IN LIGHT OF THE MANUFACTURER'S FAILURE TO WARN. I WILL NOW INSTRUCT YOU ON THE LAW AS IT RELATES TO THIS CLAIM.

A PRODUCT IS DEFECTIVE IF THE USE OF THE PRODUCT IN A MANNER THAT IS REASONABLY FORESEEABLE BY THE DEFENDANT INVOLVES A SUBSTANTIAL DANGER THAT WOULD NOT READILY — NOT BE READILY RECOGNIZED BY THE ORDINARY USER OF THE PRODUCT AND THE MANUFACTURER FAILS TO GIVE ADEQUATE WARNING OF SUCH DANGER.

THE MANUFACTURER HAS A DUTY TO PROVIDE AN ADEQUATE WARNING TO THE CONSUMER OF A PRODUCT OF POTENTIAL RISKS OR SIDE EFFECTS WHICH MAY FOLLOW THE FORESEEABLE USE OF THE PRODUCT, AND WHICH ARE KNOWN OR KNOWABLE IN LIGHT OF THE GENERALLY RECOGNIZED AND PREVAILING BEST SCIENTIFIC AND MEDICAL KNOWLEDGE AT THE TIME OF MANUFACTURE AND DISTRIBUTION.

IN DECIDING WHETHER DEFENDANTS SHOULD BE HELD STRICTLY LIABLE FOR THE INJURY TO THE PLAINTIFF, YOU ARE TO FOCUS ON THE CONDITION OF THE ASBESTOS-CONTAINING PRODUCTS THEMSELVES, AND NOT

ON THE REASONABLENESS OF DEFENDANT'S CONDUCT.

THERE IS NOT REQUIREMENT THAT A MANUFACTURER MUST GIVE A WARNING WHICH COULD NOT BE EFFECTIVE IN LESSENING THE PLAINTIFF'S RISK OF HARM.

IN A STRICT LIABILITY ACTION, IT IS NO DEFENSE THAT B P CHEMICALS HAD NO ACTUAL KNOWLEDGE THE PRODUCTS WERE DEFECTIVE.

COMPARATIVE FAULT IS NEGLIGENCE ON THE PART OF A PLAINTIFF WHICH COMBINING WITH THE NEGLIGENCE OF A DEFENDANT OR COMBINING WITH A DEFECT IN A PRODUCT CONTRIBUTES AS A LEGAL CAUSE IN BRINGING ABOUT THE INJURY.

COMPARATIVE FAULT, IF ANY, ON THE PART OF PLAINTIFF DOES NOT BAR RECOVERY BY THE PLAINTIFF AGAINST THE DEFENDANT, BUT THE TOTAL AMOUNT OF DAMAGES TO WHICH PLAINTIFF WOULD OTHERWISE BE ENTITLED SHALL BE REDUCED BY THE PERCENTAGE THAT PLAINTIFF'S COMPARATIVE FAULT CONTRIBUTED AS A LEGAL CAUSE OF HIS INJURY.

I HAVE NOT INTENDED BY ANYTHING I HAVE SAID OR DONE, OR BY ANY QUESTIONS THAT I HAVE ASKED, TO SUGGEST HOW YOU SHOULD DECIDE ANY QUESTIONS OF FACT, OR THAT I BELIEVE OR DISBELIEVE ANY WITNESS.

IF ANYTHING I HAVE DONE OR SAID HAS SEEMED TO SO INDICATE, YOU WILL DISREGARD IT AND FORM YOUR OWN OPINION.

THE PURPOSE OF THE COURT'S INSTRUCTIONS IS TO INSTRUCT YOU AS TO THE APPLICABLE LAW SO THAT YOU MAY ARRIVE AT A JUST AND LAWFUL VERDICT. WHETHER SOME INSTRUCTIONS APPLY WILL DEPEND UPON WHAT YOU FIND TO BE THE FACTS. EVEN THOUGH I HAVE INSTRUCTED YOU ON VARIOUS SUBJECTS, INCLUDING DAMAGES, YOU MUST NOT TREAT THE INSTRUCTIONS AS INDICATING THE COURT'S OPINION ON HOW YOU SHOULD DECIDE ANY ISSUE IN THIS CASE OR AS TO WHICH PARTY IS ENTITLED TO YOUR VERDICT.

IN THE JURY ROOM IT IS YOUR DUTY TO DISCUSS THE CASE IN ORDER TO REACH AN AGREEMENT IF YOU CAN.

EACH OF YOU MUST DECIDE THE CASE FOR YOURSELF, BUT SHOULD DO SO ONLY AFTER CONSIDERING THE VIEWS OF EACH JUROR.

YOU SHOULD NOT HESITATE TO CHANGE AN OPINION IF YOU ARE CONVINCED IT IS WRONG. HOWEVER, YOU SHOULD NOT BE INFLUENCED TO DECIDE ANY QUESTION IN A PARTICULAR WAY SIMPLY BECAUSE A MAJORITY OF THE JURORS, OR ANY OF THEM, FAVOR SUCH A DECISION.

THE ATTITUDE AND CONDUCT OF JURORS AT THE BEGINNING OF THEIR DELIBERATIONS ARE VERY IMPORTANT. IT IS RARELY HELPFUL

FOR A JUROR ON ENTERING THE JURY ROOM TO EXPRESS AN EMPHATIC OPINION ON THE CASE OR TO ANNOUNCE A DETERMINATION TO STAND FOR A CERTAIN VERDICT. WHEN ONE DOES THAT AT THE OUTSET, A SENSE OF PRIDE MAY BE AROUSED AND ONE MAY HESITATE TO CHANGE A POSITION EVEN IF SHOWN THAT IT IS WRONG. REMEMBER THAT YOU ARE NOT PARTISANS OR ADVOCATES IN THIS MATTER. YOU MUST BE IMPARTIAL JUDGES OF THE FACTS.

THE LAW FORBIDS YOU TO DETERMINE ANY ISSUE IN THIS CASE BY CHANCE, SUCH AS THE FLIP OF A COIN, THE DRAWING OF LOTS, OR BY ANY OTHER CHANCE DETERMINATION. FOR EXAMPLE, IF YOU DETERMINE THAT A PARTY IS ENTITLED TO RECOVER, YOU MUST NOT ARRIVE AT THE AMOUNT OF DAMAGES TO BE AWARDED OR ANY PERCENTAGE OF NEGLIGENCE BY AGREEING IN ADVANCE TO DETERMINE AN AVERAGE AND TO MAKE THAT YOUR VERDICT WITHOUT FURTHER EXERCISE OF YOUR INDEPENDENT CONSIDERATION, JUDGMENT, AND DECISION.

THE INSTRUCTIONS WHICH I AM NOW GIVING YOU WILL BE MADE AVAILABLE IN WRITTEN FORM FOR YOUR DELIBERATIONS.

YOU WILL FIND THAT THE INSTRUCTIONS MAY BE TYPED, PRINTED, OR HANDWRITTEN. PORTIONS MAY HAVE BEEN ADDED OR DELETED. YOU MUST DISREGARD ANY DELETED PART OF AN INSTRUCTION AND NOT SPECULATE AS TO WHAT IT WAS OR AS TO THE REA-

SONS FOR ITS DELETION. YOU ARE NOT TO BE CONCERNED WITH THE REASONS FOR ANY MODIFICATION.

EVERY PART OF THE TEXT OF AN INSTRUCTION, WHETHER TYPED, PRINTED, OR HANDWRITTEN, IS OF EQUAL IMPORTANCE. YOU ARE TO BE GOVERNED ONLY BY THE INSTRUCTION IN ITS FINAL WORDING.

YOU SHALL NOW RETIRE AND SELECT ONE OF YOUR NUMBER TO ACT AS FOREPERSON. YOUR FOREPERSON SHALL PRESIDE OVER YOUR DELIBERATIONS. ALL JURORS SHOULD PARTICIPATE IN ALL DELIBERATIONS AND VOTE ON EACH ISSUE.

ANSWER THE QUESTIONS ACCORDING TO THE DIRECTIONS ON THE FORM AND ALL OF THE INSTRUCTIONS OF THE COURT. IF NINE OR MORE CAN AGREE ON THE ANSWERS, YOU SHALL RETURN A SPECIAL VERDICT IN THE FORM OF WRITTEN ANSWERS TO QUESTIONS ON A FORM YOU WILL BE GIVEN.

AS SOON AS ANY NINE OR MORE JURORS HAVE AGREED UPON EACH ANSWER, HAVE THE ANSWERS SIGNED AND DATED BY YOUR FOREPERSON, AND RETURN WITH IT TO THIS ROOM. IT NEED NOT BE THE SAME NINE OR MORE JURORS THAT AGREE UPON EACH ANSWER TO THE QUESTIONS.

YOU WILL BE POLLED IN OPEN COURT. AT THAT TIME, EACH JUROR MUST BE ABLE TO STATE TRUTHFULLY THAT THE ANSWER DOES OR DOES NOT EXPRESS HIS OR HER VOTE.

THEREFORE, EACH OF YOU PLEASE KEEP A RECORD OF HOW YOU VOTED ON EACH QUESTION.

SWEAR THE BAILIFF.

(WHEREUPON, THE BAILIFF WAS DULY SWORN TO TAKE CHARGE OF THE JURY.)

THE COURT: MR. SWANSON, HAVE YOU MADE A XEROX COPY OF MY ORIGINAL INSTRUCTIONS WITH THE PAGE NUMBERS?

APPENDIX 9

ALAN R. BRAYTON, ESQ.
PHILIP A. HARLEY, ESQ.
JUDY D. JONAS, ESQ.
BRAYTON, GISVOLD & HARLEY
Attorneys at Law
999 Grant Avenue
P.O. Box 2109
Novato, California 94948
(415) 898-1555

Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ROBERT GAYLORD AND
JANET GAYLORD,

Plaintiffs,

vs.

B. P. CHEMICALS
(HITCO) INC.,

Defendants.

No. 891562

ENTRY OF JUDGMENT ON
SPECIAL VERDICT FOR
PLAINTIFFS (C.C.P. 664)

This action came on regularly for trial by jury on April 20, 1992, with plaintiffs Robert and Janet Gaylord appearing in person and by Philip A. Harley and Judy D. Jonas, their attorneys, and defendant appearing by Jeffrey Fadeff, their attorney; a jury of twelve persons and four alternates was duly impaneled and sworn; witnesses testified; and after being duly instructed by the court, the jury deliberated and thereupon duly returned the attached special verdicts on May 19, 1992 and June 24, 1992.

It appearing that by reason of those special verdicts, plaintiffs are entitled to judgment against defendant for monetary damages.

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED, that judgment be entered in favor or Robert Gaylord in the amount of $1,304,000.00 and Janet Gaylord for $200,000.00 less credits for prior settlements, comparative fault, and allocation pursuant to Civil Code § 1431-35 together with costs as determined by this court.

IT IS FURTHER ORDERED that all proceedings to enforce this judgment are stayed until the court finally determines all post-trial motions filed in this case or until August 15, 1992, whichever occurs sooner. This stay may be extended by further order of the court.

DATED: June 29, 1992

By: /s/ LAURENCE D. KAY
Judge of the Superior Court
The Honorable Laurence Kay

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ROBERT GAYLORD and
JANET GAYLORD,

Plaintiffs,

vs.

B. P. CHEMICALS,
(HITCO), INC.

Defendants.

No. 891562

SPECIAL VERDICT

We, the jury in the above-entitled case, find the following special verdict on the questions submitted to us:

Question No. 1:

Does ROBERT GAYLORD have an injury or disease legally caused by his exposure to asbestos?

Answer "yes" or "no". Yes X No _____

If you answer Question No. 1 "no", then proceed to Question No. 3(A) and answer it. If you have answered Question No. 1 "yes", then answer the next question.

Question No. (A):

Do you find that the evidence is sufficient to permit you to reasonably apportion the cause of ROBERT GAYLORD's lung cancer?

Answer "yes" or "no". Yes _____ No X

If you answer Question No. 2(A) "no", continue on to Question No. 3(A). If you have answered Question No. 2(A) "yes", then answer question 2(B).

Question No. 2(B):

Assuming that 100% represents the total legal causes of ROBERT GAYLORD's lung cancer, what percentage of this 100% is attributable to:

Asbestos	_____%
Cigarettes	_____%
All other causes	_____%

If you answered question 2(B), answer Question No. 3(A).

Question No. 3(A):

Does ROBERT GAYLORD need future medical surveillance as a result of his past exposure to asbestos and asbestos-containing products?

Answer "yes" or "no". Yes X No _____

If ~~you~~ answered "no" to both Question No. 3(A) and Question No. 1, then sign and return your verdict. If you answered "yes" to Question No. 1 and "no" to Question No. 3(A), proceed to Question No. 4. If you answered "yes" to Question 3(A), answer question 3(B).

Question No. 3(B):

What is the amount of damages ROBERT GAYLORD is entitled to for future medical monitoring?

Answer: $5,000.00

If you answered Question No. 1 "no", then sign and return your verdict. If you answered Question No. 1 "yes", then proceed to Question No. 4.

Question No. 4:

What do you find to be the total amount of damages, including economic and non-economic damages, if any,

suffered (both past and future) by ROBERT GAYLORD as a legal result of his asbestos-related injury or disease?

(A) Medical (excluding monitoring)	$234,000.00
(B) Earning Capacity/Wage Loss	$865,000.00
(C) Non-economic	$200,000.00

Question No. 5:

What is the total amount of non-economic damages, if any, for JANET GAYLORD's loss of consortium suffered as a legal result of ROBERT GAYLORD's asbestos-related disease or injury from the onset of the disease until his death.

Answer: Non-Economic Damages: $200,000.00

Dated: May 19, 1992

/s/ ILLAYENE S. CARRICK
Foreperson

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ROBERT GAYLORD and
JANET GAYLORD,

Plaintiffs,

vs.

B. P. CHEMICALS (HITCO)
INC.,

Defendants.

No. 891562

SPECIAL VERDICT PHASE II

We, the jury in the above-entitled action, find the following Special Verdict on the questions submitted to us:

Question No. 1: Answer *all* of the following questions:

A. (1) Were the asbestos-containing products manufactured, distributed or supplied by B. P. Chemicals (HITCO) Inc., defective in design by posing a substantial danger that would not be readily recognized by the ordinary user when used in a manner that was reasonably foreseeable by this defendant?

Answer "yes" or "no". Yes X No _____

(2) Did this company fail to give adequate warning of potential risks which are known or in the exercise of reasonable care should have been known?

Answer "yes" or "no". Yes X No _____

B. Were B. P. Chemicals' asbestos-containing products defective in design by failing to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner?

Answer "yes" or "no". Yes X No _____

If you answer "no" to all of these questions, sign and return this verdict. If you answer "yes" to any of these questions, proceed to the next question.

Question No. 2:

Was Robert Gaylord exposed to asbestos-containing products manufactured, supplied or distributed by B. P. Chemicals (HITCO) Inc.?

Answer "yes" or "no". Yes X No _____

If you answer "no", sign and return this verdict. If you answer "yes", proceed to the next question.

Question No. 3:

Was Robert Gaylord's exposure to B.P. Chemicals' containing products a legal cause of his injuries?

Answer "yes" or "no". Yes X No _____

If you answer "no", sign and return this verdict. If you answer "yes", proceed to the next question.

Question No. 4:

A. Was plaintiff's employer extraordinarily unforeseeably negligent?

Answer "yes" or "no". Yes _____ No X

3. Was such negligence a superseding cause of plaintiff's injuries?

Answer "yes" or "no". Yes _____ No X

If you answered "yes" to both questions 4(A) and (B), then sign and return this verdict. If you answered "no" to either of these questions, then proceed to Question No. 5.

Question No. 5: Answer *both* of the following questions:

A. Was Robert Gaylord negligent?

Answer "yes" or "no". Yes X No _____

B. Was Robert Gaylord's negligence a legal cause of his injuries?

Answer "yes" or "no". Yes X No _____

If you answer "no" to either 5(A) or (B), proceed to question no. 7. If you answer "yes" to both of these questions, proceed to the next question.

Question No. 6:

Assuming that 100% represents the total legal causes of Robert Gaylord's injuries, what percentage of this 100% is due to the comparative fault of Robert Gaylord and what percentage of the 100% is attributable to B. P. Chemicals (HITCO) Inc., and all other persons or entities?

To Robert Gaylord	10%
To B. P. Chemicals (HITCO) Inc.	25%
To all other persons or entities	65%
TOTAL:	100%

Question No. 7:

Assuming that 100% represents the total legal causes of Robert Gaylord's injuries, what percentage of this 100% is attributable to the asbestos-containing products of B. P. Chemicals (HITCO) Inc., and all other persons or entities (excluding Robert Gaylord)?

To B. P. Chemicals (HITCO) Inc.	__%
To all other persons or entities	__%

DATED: June 24, 1992.

/s/ TIMOTHY JACKS
Foreperson

PROOF OF SERVICE BY MAIL

I am employed in the County of Marin, State of California. I am over the age of 18 years and am not a party to the within action. My business address is 999 Grant Avenue, Novato, California 94947.

On July 8, 1992, I served the within:

Notice of Entry of Judgment (with attached Entry of Judgment on Special Verdict for Plaintiffs) on the interested parties in this action by transmitting a true copy thereof in the following manner.

I caused each of the above document(s) to be placed in a sealed envelope, postage thereon prepaid, addressed and served as follows:

BERRY & BERRY
Station D, P.O. Box 70250
Oakland, CA 94612-0250

B. P. CHEMICALS (HITCO) INC.
Kenney, Burd, et al.
Four Embarcadero Center, 25th Floor
San Francisco, CA 94111

Clerk of San Francisco Superior Court
400 Vann Ness Avenue
San Francisco, CA 94102

BY MAIL SERVICE: I am readily familiar with the business practice at my place of business for collection and processing of correspondence for delivery by mail. Correspondence so collected and processed is deposited with the United States Postal Service on the same day in the ordinary course of business. On the above date the said envelope was collected for the United States Postal Service following ordinary business practices.

Executed this 8th day of July, 1992, at Novato, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____

APPENDIX 10

ALAN R. BRAYTON, ESQ.
PHILIP A. HARLEY, ESQ.
JUDY D. JONAS, ESQ.
BRAYTON, GISVOLD & HARLEY
Attorneys at Law
999 Grant Avenue
P.O. Box 2109
Novato, California 94948
(415) 898-1555

Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ROBERT GAYLORD and JANET GAYLORD Plaintiffs, vs. B.P. CHEMICALS (HITCO) INC., Defendants.	No. 891562 NOTICE OF ENTRY OF JUDGMENT

Notice of entry of judgment is hereby given on July 2, 1992. See attached entry of judgment on special verdict for plaintiffs.

DATED: July 8, 1992

BRAYTON, GISVOLD & HARLEY

By: /s/ JUDY D. JONAS
Judy D. Jonas
Attorneys for Plaintiffs

APPENDIX 11

STEPHEN C. KENNEY
JEFFERY J. FADEFF
KENNEY, BURD, KNUTSON & MARKOWITZ
4 Embarcadero Center, Suite 2500
San Francisco, California 94111
Telephone: (415) 397-3100

Attorneys for Defendant
BP CHEMICALS (HITCO) INC.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

ROBERT GAYLORD and JANET GAYLORD, Plaintiffs, vs. BP CHEMICALS (HITCO) INC., Defendant.	CASE NO. 891562 DEFENDANT BP CHEMICALS' NOTICE OF INTENTION TO MOVE FOR NEW TRIAL AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT Date: August 21, 1992 Time: 10:00 a.m. Dept: 19 Judge: Hon. Laurence Kay

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that defendant BP Chemicals (HITCO) INC. ("defendant") intends to move this Court, pursuant to Code of Civil Procedure section 659, at a time to be set by the Court, to vacate and set aside the verdict of the jury, rendered in favor of plaintiffs and against defendant and the judgment entered on that verdict on July 2, 1992 and to grant defendant a new trial.

The motion will be made on the following grounds as shown by the minutes of the court and upon declarations and affidavits:

1. Irregularity in the proceedings of the Court, jury, or adverse party, or any order of the court or abuse of discretion which prevented defendant from having a fair trial;

2. Misconduct of the jury;

3. Accident or surprise;

4. Newly discovered evidence;

5. Excessive damages;

6. Insufficiency of the evidence to justify the verdict or other decision;

7. Error in law, occurring at the trial;

8. The verdict was against law.

The motion for new trial will be made and based, with respect to the grounds specified, upon the minutes of the Court, transcripts of the proceedings, the pleadings on file, and memoranda of points and authorities, and declarations and affidavits, all to be filed within ten days hereafter.

NOTICE IS FURTHER GIVEN, that defendant BP Chemicals will also move the Court, pursuant to Code of Civil Procedure section 629, at the same time as the hearing on the motion for new trial, for an order vacating and setting aside the verdict of the jury, and judgment entered thereon, and to enter a new judgment notwithstanding the verdict in favor of defendant, upon the grounds that there was no substantial evidence to establish causation of any injury and that there was no substantial evidence to establish defendant's liability.

The motion for judgment notwithstanding the verdict shall be based upon the same materials as the motion for new trial.

DATED: July , 1992

KENNEY, BURD, KNUTSON & MARKOWITZ

By: /s/ JEFFERY J. FADEFF

Jeffery J. Fadeff
Attorneys for Defendant
BP CHEMICALS (HITCO) INC.

PROOF OF SERVICE

I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is Four Embarcadero Center, 25th Floor, San Francisco, California 94111.

On July , 1992, following ordinary business practices, I placed for collection and mailing at the offices of Kenney, Burd, Knutson & Markowitz, located at Four Embarcadero Center, 25th Floor, San Francisco, California 94111, a copy of the attached Defendant BP Chemicals' Notice of Intention to Move For New Trial and For Judgment Notwithstanding the Verdict in a sealed envelope with postage thereon fully prepaid, addressed as follows:

Alan R. Brayton, Esq.
Brayton, Gisvold & Harley
999 Grant Avenue
P.O. Box 2109
Novato, CA 94948

I am readily familiar with the business's practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this day of July, 1992.

/s/ SHARON K. PROSSER
Sharon K. Prosser

APPENDIX 12

PHILIP A. HARLEY, ESQ.
JUDY J. JONAS ESQ.
BRAYTION, GISVOLD & HARLEY
Attorneys at Law
999 Grant Avenue
P.O. Box 2109
Navato, California 94948
(415) 898-1555

Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ROBERT GAYLORD and JANET GAYLORD Plaintiffs, vs. BP CHEMICALS (HITCO) INC. Defendant.	No. 891562 NOTICE OF RULING ON MOTION FOR NEW TRIAL

On August 28, 1992, defendant BP CHEMICALS (HITCO) INC.'s Motion For New Trial came on for hearing. Appearing on behalf of plaintiffs were Philip A. Harley and Judy Jonas. Appearing on behalf of defendant BP CHEMICALS was Jeffery J. Fadeff. The Honorable Laurence D. Kay presiding. After reviewing the submitted memorandum of all parties and hearing arguments of counsel, the court ruled that BP CHEMICALS INC.'s Motion For New Trial and Judgment Notwithstanding the Verdict was denied.

Dated: 9-1-92

BRAYTON, GISVOLD & HARLEY,

By: /s/ PHILIP A. HARLEY
Philip A. Harley
Attorneys for Plaintiffs

PROOF OF SERVICE BY MAIL

I am employed in the County of Marin, State of California. I am over the age of 18 years and am not a party to the within action. My business address is 999 Grant Avenue, Novato, California 94947.

On September 1, 1992, I served the within:

NOTICE OF RULING ON MOTION FOR NEW TRIAL on the interested parties in this action by transmitting a true copy thereof in the following manner.

I caused each of the above document(s) to be placed in a sealed envelope, postage thereon prepaid, addressed and served as follows:

Jeffery J. Fadeff, Esq.
KENNEY, BURD, KNUTSON & MARKOWITZ
4 Embarcadero Center, Suite 2500
San Francisco, CA 94111

BY MAIL SERVICE: I am readily familiar with the business practice at my place of business for collection and processing of correspondence for delivery by mail. Correspondence so collected and processed is deposited with the United States Postal Service on the same day in the ordinary course of business. On the above date the said envelope was collected for the United States Postal Service following ordinary business practices.

Executed this 1st day of September, 1992, at Novato, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ MARCI VONFELDT
Marci VonFeldt

Robert Gaylord, et al. v. Abex Corporation, et al.
San Francisco County Superior Court Case No. 891562

APPENDIX 13

STEPHEN C. KENNEY
JEFFERY J. FADEFF
KENNEY, BURD, KNUTSON & MARKOWITZ
4 Embarcadero Center, Suite 2500
San Francisco, California 94111
Telephone: (415) 397-3100

Attorneys for Defendant
BP CHEMICALS (HITCO) INC.

**IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO**

ROBERT GAYLORD and
JANET GAYLORD,

Plaintiffs and
Respondents,

v.

BP CHEMICALS (HITCO) INC.,

Defendant and
Appellant.

CASE NO. 891562

NOTICE OF APPEAL

[C.C.P. §904.1(a)]

Defendant and appellant, BP CHEMICALS (HITCO) INC., appeals to the Court of Appeal of the State of California, First Appellate District, from the judgment entered on July 2, 1992, in favor of plaintiffs. The notice of ruling denying defendant's motion for a new trial was entered on September 2, 1992.

DATED: September 28, 1992

KENNEY, BURD, KNUTSON & MARKOWITZ

By: /s/ JEFFERY J. FADEFF, ESQ.
Jeffery J. Fadeff, Esq.
Attorneys for Defendant
and Appellant
BP CHEMICALS (HITCO)
INC.

PROOF OF SERVICE

I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is Four Embarcadero Center, 25th Floor, San Francisco, California 94111.

On September 28, 1992, following ordinary business practices, I placed for collection and mailing at the offices of Kenney, Burd, Knutson & Markowitz, located at Four Embarcadero Center, 25th Floor, San Francisco, California 94111, a copy of the attached NOTICE OF APPEAL in a sealed envelope with postage thereon fully prepaid, addressed as follows:

Brayton, Gisvold & Harley
999 Grant Avenue
P.O. Box 2109
Novato, CA 94948

I am readily familiar with the business's practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 28th day of September, 1992.

/s/ SHARON K. PROSSER
Sharon K. Prosser

APPENDIX 14

PHILIP A. HARLEY, ESQ.
JUDY J. JONAS, ESQ.
BRAYTON, GISVOLD & HARLEY
Attorneys at Law
999 Grant Avenue
P.O. Box 2109
Novato, California 94948
(415) 898-1555

Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ROBERT GAYLORD and JANET GAYLORD Plaintiffs, vs. BP CHEMICALS (HITCO) INC., Defendant.	No. 891562 ORDER DENYING NEW TRIAL

On August 28, 1992, defendant BP CHEMICALS (HITCO) INC.'s Motion For New Trial came on for hearing. Appearing on behalf of the moving party defendant BP CHEMICALS was Jeffery J. Fadeff, of KENNEY, BURD, KNUTSON & MARKOWITZ. Appearing on behalf of the plaintiffs ROBERT GAYLORD and JANET GAYLORD were Philip A. Harley and Judy Jonas of Brayton, Gisvold & Harley. Prior to the hearing, this court had reviewed the papers submitted on behalf of the parties. The court heard additional argument of counsel at the time of the hearing. After being fully advised of the premises and hearing arguments of counsel, defendant's Motion for New Trial was denied. The court explained its rationale for denying the Motion for New Trial in detail on the record at the time of the hearing. Those comments are hereby incorporated into this order.

THEREFORE IT IS ORDERED that defendant BP CHEMICALS' Motion for New Trial is denied.

Dated: Sept. 30, 1992

/s/ LAURENCE D. KAY
Laurence D. Kay
Judge of the Superior Court

APPROVED AS TO FORM:
Dated: 9/25/92

BRAYTON, GISVOLD & HARLEY

By: /s/ PHILIP A. HARLEY
Philip A. Harley
Attorneys for Plaintiffs

Dated: 9/22/92

KENNEY, BURD, KNUTSON & MARKOWITZ

By: /s/ JEFFERY J. FADEFF
Jeffery J. Fadeff
Attorneys for Defendant
BP CHEMICALS
(HITCO) INC.

PROOF OF SERVICE BY MAIL

I am employed in the County of Marin, State of California. I am over the age of 18 years and am not a party to the within action. My business address is 999 Grant Avenue, Novato, California 94947.

On October 12, 1992, I served the within:

ORDER DENYING NEW TRIAL on the interested parties in this action by transmitting a true copy thereof in the following manner.

I caused each of the above document(s) to be placed in a sealed envelope, postage thereon prepaid, addressed and served as follows:

Jeffery J. Fadeff, Esq.
KENNEY, BURD, KNUTSON & MARKOWITZ
Four Embarcadero Center, Suite 2500
San Francisco, CA 94111

BY MAIL SERVICE: I am readily familiar with the business practice at my place of business for collection and processing of correspondence for delivery by mail. Correspondence so collected and processed is deposited with the United States Postal Service on the same day in the ordinary course of business. On the above date the said envelope was collected for the United States Postal Service following ordinary business practices.

Executed this 12th day of October, 1992, at Novato, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ MARCI VONFELDT
Marci VonFeldt

Robert Gaylord, et al. v. Abex Corporation, et al.
San Francisco County Superior Court Case No. 891562

APPENDIX 15

PHILIP A. HARLEY, ESQ.
JUDY J. JONAS, ESQ.
BRAYTON, GISVOLD & HARLEY
Attorneys at Law
999 Grant Avenue
P.O. Box 2109
Novato, California 94948
(415) 898-1555

Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ROBERT GAYLORD and JANET GAYLORD, Plaintiffs, vs. BP CHEMICALS (HITCO) INC. Defendant.	No. 891562 JUDGMENT NUNC PRO TUNC

This action came on regularly for trial by jury on April 20, 1992 with plaintiffs ROBERT GAYLORD and JANET GAYLORD appearing in person and by Philip A. Harley and Judy Jonas, their attorneys. Defendant BP CHEMICALS (HITCO) INC. appearing by Jeffery J. Fadeff, their attorney. A jury of 12 persons and four alternates were duly impanelled and sworn, witnesses testified and after being duly instructed by the court, the jury deliberated and thereon duly returned special verdicts on May 19, 1992 and June 24, 1992. pursuant to the special verdicts, this court entered judgment on July 2, 1992.

Judgment of July 2, 1992 is hereby modified nunc pro tunc. The judgment for ROBERT GAYLORD should now be entered in the amount of $931,159.00 and for JANET GAYLORD in the amount of $50,000.00. These amounts reflect credits for prior settlements, comparative fault and

allocation pursuant to Divil Code § 1431-35. Costs are also awarded in the amount of $9,542.90 payable in either case.

Dated: Sept. 30, 1992

/s/ LAURENCE D. KAY
Laurence D. Kay
Judge of the Superior Court

APPROVED AS TO FORM:
Dated: 9/25/92

BRAYTON, GISVOLD & HARLEY

By: /s/ PHILIP A. HARLEY
Philip A. Harley
Attorneys for Plaintiffs

Dated: 9/22/92

KENNEY, BURD, KNUTSON & MARKOWITZ

By: /s/ JEFFERY J. FADEFF
Jeffery J. Faddeff
Attorneys for Defendant
BP Chemicals (HITCO) INC.

PROOF OF SERVICE BY MAIL

I am employed in the County of Marin, State of California. I am over the age of 18 years and am not a party to the within action. My business address is 999 Grant Avenue, Novato, California 94947.

On October 12, 1992, I served the within:

JUDGMENT NUNC PRO TUNC on the interested parties in this action by transmitting a true copy thereof in the following manner.

I caused each of the above document(s) to be placed in a sealed envelope, postage thereon prepaid, addressed and served as follows:

Jeffrey J. Fadeff, Esq.
KENNEY, BURD, KNUTSON & MARKOWITZ
Four Embarcadero Center, Suite 2500
San Francisco, CA 94111

BY MAIL SERVICE: I am readily familiar with the business practice at my place of business for collection and processing of correspondence for delivery by mail. Correspondence so collected and processed is deposited with the United States Postal Service on the same day in the ordinary course of business. On the above date the said envelope was collected for the United States Postal Service following ordinary business practices.

Executed this 12th day of October, 1992, at Novato, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ MARCI VONFELDT
Marci VonFeldt

Robert Gaylord, et al. v. Abex Corporation, et al.
San Francisco County Superior Court Case No. 891562

APPENDIX 16

STEPHEN C. KENNEY
JEFFERY J. FADEFF
KENNEY, BURD, KNUTSON & MARKOWITZ
4 Embarcadero Center, Suite 2500
San Francisco, California 94111
Telephone: (415) 397-3100

Attorneys for Defendant and Appellant
BP CHEMICALS (HITCO) INC.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

ROBERT and JANET GAYLORD Plaintiffs, Respondents, v. BP CHEMICALS (HITCO) INC., Defendant, Appellant.	CASE NO. 891562 NOTICE OF POSTING OF BOND

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 27, 1992, defendant BP Chemicals (HITCO) Inc. posted its bond, number 8301-27-28, in the amount of $1,621,739.00. A true and correct copy of said bond is attached hereto.

Dated: October 27, 1992

KENNEY, BURD, KNUTSON & MARKOWITZ

By: /s/ JEFFERY J. FADEFF
Jeffery J. Fadeff
Attorneys for Defendant and Appellant
BP CHEMICALS (HITCO) INC.

XXX FEDERAL INSURANCE COMPANY

Amount $1,621,739.00 **Bond No. 8301-27-28**

IN THE SUPERIOR COURT OF THE CITY OF SAN FRANCISCO, COUNTY OF SAN FRANCISCO

STATE OF CALIFORNIA

ROBERT GAYLORD and
JANET GAYLORD

Plaintiffs,

vs.

BP CHEMICALS (HITCO) INC.

Defendants.

Action No. 891562

Undertaking APPEAL

WHEREAS, the Defendant desire(s) to give an undertaking of Appeal as provided to be given in Section 917.1 of the C.C.P.

NOW, THEREFORE, the undersigned surety. FEDERAL INSURANCE COMPANY a surety company authorized to act as surety on bonds and undertakings in the State of California, does hereby obligate itself to the said Plaintiffs under such statutory obligations in the sum of One Million, Six Hundred Twenty One Thousand, Seven Hundred Thirty Nine and no/100th Dollars ($1,621,739.00).

SIGNED, SEALED AND DATED this 27th day of October, 1992.

FEDERAL INSURANCE COMPANY

By: /s/ LORNA E. DECLINES
Lorna E. Declines
Atty-in-fact

STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO } ss.:

On this 27th day of October in the year 1992 before me, THERESA W. GARDE a Notary Public, State of California, duly commissioned and sworn, personally appeared Lorna E. Declines personally known to me (or proved to me on the basis of satisfactory evidence) to be the Attorney-in-Fact of the corporation that executed the within instrument, and also known to me to be the person _____ who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same. _____.

_____.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the _____ _____ County of San Francisco on the date set forth above in this certificate.

/s/ THERESA W. GARDE
Notary Public, State of California

My commission expires _____

POWER OF ATTORNEY

Know all Men by these Presents, That the FEDERAL INSURANCE COMPANY, 15 Mountain View, Warren, New Jersey, an Indiana Corporation, has constituted and appointed, and does hereby constitute and appoint James Orellana, Lorna E. Declines, W. J. Tabinsky, Andrew Kammerer and Lori A. Bosshart of San Francisco, California each its true and lawful Attorney-in-Fact to execute under such designation in its name and to affix its corporate seal to and deliver for and on its behalf as surety thereon or otherwise, bonds or obligations (other than Bail Bonds) given or executed in the course of its business, and any instruments amending or altering the same, and consents to the modification or alteration of any instruments referred to in said bonds or obligations.

[UNREADABLE]
Dated: 1st day of May 1990

[FEDERAL INSURANCE CO. SEAL]

STATE OF NEW JERSEY }
County of Somerset } ss.:

Dated: 1st day of May 1990

[UNREADABLE]

[NOTARY SEAL]

STATE OF NEW JERSEY }
County of Somerset } ss.:

[UNREADABLE]
Dated: 27th day of October 1992

[FEDERAL INSURANCE CO. SEAL]

PROOF OF SERVICE

I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is Four Embarcadero Center, 25th Floor, San Francisco, California 94111.

On October 28, 1992, following ordinary business practices, I placed for collection and mailing at the offices of Kenney, Burd, Knutson & Markowitz, located at Four Embarcadero Center, 25th Floor, San Francisco, California 94111, a copy of the attached **NOTICE OF POSTING OF BOND** is a sealed envelope with postage thereon fully prepaid, addressed as follows:

Brayton, Gisvold & Harley
999 Grant Avenue
P.O. box 2109
Novato, CA 94948

I am readily familiar with the business's practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 28, 1992 at San Francisco, California.

/s/ SHARON K. PROSSER
Sharon K. Prosser

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF
SAN FRANCISCO
APPEALS DIVISION ROOM 317, CITY HALL
SAN FRANCISCO, CALIFORNIA

ROBERT GAYLORD

Plaintiff(s)

vs.

BP CHEMICALS et al

Defendant's

No. 891-562

CLERK'S NOTICE OF FILING OF NOTICE OF CROSS-APPEAL

You and each of you are notified that a notice of cross-appeal was filed in the above entitled action on 10/20/92 from the ruling in this action denying plaintiffs' claims pursuant to C.C.P.$998.

Dated: 10/21/92

MICHAEL K. TAMONY, Clerk

By: /s/ ELIAS BUTT

Elias Butt
Deputy Clerk

CERTIFICATE OF MAILING

I, Elias Butt, Deputy County Clerk and Deputy Clerk of the Superior Court of the City and County of San Francisco, certify that I am not a party to the above action, that I served a copy of the above notice by placing said copy in an envelope addressed to the following:

Court of Appeal, 303 Second St. #600, San Francisco, CA 94107

Kenney, Burd at al, Four Embarcadero Center, 25th Foor, S.F. CA 94111.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 10/21/92, at San Francisco, California.

MICHAEL K. TAMONY,
Clerk

By: /s/ ELIAS BUTT
Elias Butt
Deputy Clerk

APPENDIX 17

Civil No: AO 59183
San Francisco County Superior Court No. 891562

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT — DIVISION FOUR

ROBERT and JANET GAYLORD, Plaintiffs, Respondents, Cross-Appellants, vs. BP CHEMICALS (HITCO) INC., Defendant, Appellant, Cross-Respondent.	Action No: AO 59183 San Francisco County Superior Court Action No. 891562

APPELLANT'S OPENING BRIEF

The Honorable Laurence Kay, Judge

STEPHEN C. KENNEY, ESQ.
JEFFERY J. FADEFF, ESQ.
TOM K. HAMMITT, ESQ.
KENNEY, BURD, KNUTSON & MARKOWITZ
4 Embarcadero Center, Suite 2500
San Francisco, California 94111
Telephone: (415) 397-3100

Attorneys for Defendant, Appellant and Cross-Respondent
BP CHEMICALS (HITCO) INC.

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STATUTES

28 U.S.C. § 2680(a) 18

COMES NOW appellant BP Chemicals (HITCO) Inc. (BP Chemicals) and states as follows for its Opening Brief in the above-referenced appeal:

I. INTRODUCTION

BP Chemicals takes this appeal from the trial court's judgment in the matter of *Robert Gaylord and Janet Gaylord v. BP Chemicals (HITCO) Inc.*, No. 891562 in the San Francisco County Superior Court. As set forth herein, the errors that occurred during the original trial of this matter prejudiced BP Chemicals, and fully warrant remanding this matter for a new trial.

This action is for personal injuries arising from Mr. Gaylord's lung cancer. The plaintiff/respondents (hereinafter "plaintiffs") allege that Mr. Gaylord's cancer was caused by the combined affect of his cigarette smoking and his alleged exposure to asbestos-containing products manufactured by U.S. Polymeric, BP Chemicals predecessor company. The plaintiffs allege that Mr. Gaylord was exposed to U.S. Polymeric's products while working at Kaiser Aerospace in San Leandro from 1956 through 1987.

A. Procedural Background

This action was consolidated with several other asbestos cases that were designated as Brayton Group 20. It was tried in consolidation with one other lawsuit, *Casey v. Kaiser Cement and Kaiser Gypsum*, No. 906436, which involved more serious lung cancer injuries that also were allegedly caused by the combination of cigarette smoking and asbestos exposure. On the court's motion, and over the objections of the parties, the trial was "reverse bifurcated," with the issues of the plaintiffs' damages and medical causation tried in Phase I, and the issues of the defendants' liability and the plaintiffs' contributory negligence for cigarette smoking tried in Phase II.

At the end of Phase I, the jury returned verdicts in favor of both the Gaylord and Casey plaintiffs. In the *Gaylord* action, the jury found the plaintiffs had suffered a total of $1,504,000 in damages. (Phase I Special Verdict Form, Nos. 3-5). Of this amount, $234,000 was for Mr. Gaylord's past and future medical expenses, and $5,000 was for future medical monitoring. *Id.*, Nos. 3(B), 4(A). The balance comprised damages for Mr. Gaylord's lost earnings and lost earnings potential, and noneconomic losses. *Id.*, Nos. 4(B), (C). In the *Casey* matter, the jury awarded a total of $480,000, of which $90,000 was for medical expenses. (TR, 1193:26).

Two defendants, BP Chemicals and Kaiser, were present in Phase I of the *Gaylord* trial. However, Kaiser settled out between trial phases, leaving BP Chemicals as the sole defendant in Phase II. At the end of Phase II, the jury returned a verdict allocating liability for Mr. Gaylord's injuries as follows: 10 percent to Mr. Gaylord, for his contributory negligence in smoking; 25 percent to BP Chemicals; and 65 percent to other parties who were responsible for Mr. Gaylord's asbestos exposure. (Phase II Special Verdict Form, No. 6). Subsequently, the trial court denied BP Chemicals' motion for a new trial, and BP Chemicals brought the instant appeal.

B. Factual Background

1. U.S. Polymeric

At all relevant times, U.S. Polymeric manufactured resin impregnated fabric tape products used in the aerospace industry. These tape products were made through a process called "preimpregnation," in which fabric woven from one of several different industrial fibers, such as carbon, graphite or silica, were impregnated with resin. (TR, 1570:10-1572:24).

Prior to 1975, U.S. Polymeric also manufactured limited amounts of preimpregnated tape products using chrysotile, a form of asbestos. (TR, 1587:23-1588:2). These products were used by the defense industry, which valued them for their heat-shielding, "ablative" qualities.[1] (TR, 1606:3-24).

One of U.S. Polymeric's customers for these products was Kaiser Aerospace. Kaiser used U.S. Polymeric's asbestos-containing tape as an ablative liner in the rocket motor nozzles of the second stages of the Polaris A3 and Poseidon missiles, which it manufactured under contract with the United States government. (TR, 1580:3-6). The asbestos-containing product that U.S. Polymeric supplied for the Polaris program was designated as product number "FM 5076." (TR, 1588:23-27). The U.S. Polymeric product used in the Poseidon program was "FM 5075." (TR, 1594:24-1595:6).

U.S. Polymeric did not supply Kaiser with any other asbestos-containing products. U.S. Polymeric did, however, supply Kaiser with several tape products that did not contain asbestos, including "FM 5063" (which contained carbon fiber), "FM 5042" (containing fiberglass) and "FM 5020," (containing silica). (TR, 1582:18-1583:28).

U.S. Polymeric stopped supplying asbestos-containing products to Kaiser in 1975. After learning of the potential hazards of asbestos exposure in 1972, U.S. Polymeric began printing warnings on the boxes in which these products were delivered. (TR, 1591:1-28; 1614:24-1615:1). Also from 1972 on, U.S. Polymeric stopped supplying asbestos-con-

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[1] As relevant herein, ablative materials are used in the rocket motor nozzles and nosecones of missiles to protect them from heat. "Ablation" is the process by which the shield materials combine with, and are eroded by, the hot gases associated with thrust generation or reentry into the Earth's atmosphere. (TR, 1567:26-1569:7).

taining materials except where it was required under existing government contracts. (TR, 1592:1-1594:23).

2. Janet and Robert Gaylord

Plaintiffs Janet and Robert Gaylord are husband and wife. Robert Gaylord, age 59 at the time of the trial, suffers from lung cancer allegedly caused by the combination of asbestos exposure and cigarette smoking. In 1990, Mr. Gaylord underwent a lobectomy in which the upper two-thirds of his right lung was removed. (TR,295:3-6; 389:4-9). Mr. Gaylord also has been treated with drugs and radiation therapy. (TR, 387:13-388:9) His cancer, according to the plaintiffs' medical experts, is terminal. (TR, 299:9-12).

a. Mr. Gaylord's Smoking

Mr. Gaylord testified that he smoked cigarettes for 34 years, until only two months before being diagnosed with lung cancer. (TR, 300:26-27; 383:25-384:2) Mr. Gaylord smoked an average of one-half to three-quarters of a pack of cigarettes each day, and, during some periods, smoked as much as two packs per day. (TR, 288:5-21). It was undisputed that Mr. Gaylord's lifetime cigarette consumption totalled as much as 25 pack-years. (TR, 288:13-15).

b. Mr. Gaylord's Asbestos Exposure

Mr. Gaylord's asbestos exposure occurred partially through his employment at Kaiser Aerospace, where he worked from 1956 until his retirement in 1987. From 1958 onward, Mr. Gaylord operated a tracer lathe, a machine that follows precut templates to machine materials to exacting tolerances. (TR, 360:9-361:21). At trial, Mr. Gaylord recalled machining asbestos-containing parts for the Minuteman, Advanced Minuteman, Pershing and Polaris missile programs. (TR, 1293:26; 1294:19-26). As noted above, among these programs, U.S. Polymeric only supplied asbestos products for the Polaris.

Mr. Gaylord testified that his most extensive exposure to asbestos, by far, occurred in his work on the Advanced Minuteman. Mr. Gaylord testified that he machined some 90 percent of the nosecones for these missiles, which used asbestos as an ablative shield for atmospheric reentry. (TR, 1295:5-8). Mr. Gaylord testified that he machined "thousands and thousands" of Advanced Minuteman nosecones. (TR, 369:25-28). Two of the plaintiffs' expert witnesses, Dr. Kenneth Cohen, an industrial hygienist, and pathologist Dr. Samuel Hammar, corroborated Mr. Gaylord's testimony that his most serious exposures occurred on the Advanced Minuteman program. (TR, 192:10-195:18 (testimony of Dr. Cohen); TR, 624:16-21 (testimony of Dr. Hammar)).

However, the evidence was undisputed that U.S. Polymeric's asbestos-containing tape was not used on the Advanced Minuteman program. (TR, 1584:3-5). The asbestos used in the Advanced Minuteman nosecones was crocidolite, the most heat-resistant form of asbestos, not chrysotile, which was the only form of asbestos that U.S. Polymeric supplied. (TR, 193:7-9). These crocidolite products were supplied by Raybestos-Manhattan, not U.S. Polymeric. (TR, 1584:1-1585:21). The plaintiffs contended that crocidolite, the most carcinogenic form of asbestos (TR, 1004:7-10), was the form of asbestos to which Mr. Gaylord was principally exposed, contributing to his lung cancer. (TR, 193:7-9; 201:26-202:26)

Another missile program on which Mr. Gaylord worked extensively was the Minuteman. Again, Raybestos-Manhattan, not U.S. Polymeric, supplied the asbestos-containing materials for the Minuteman. (TR:1584:8-1585:21). U.S. Polymeric supplied several preimpregnated tape products for the Minuteman, including FM 5063, FM 5042 and FM 5020, but none of these contained asbestos. (TR, 1582:18-1583:28).

U.S. Polymeric also supplied asbestos-containing tape to Kaiser for use on the Poseidon. However, Mr. Gaylord testified that he only worked on a few of the subassemblies for this missile (TR, 1294:25-26), and the plaintiffs did not contend this was a significant source of his asbestos exposure. Kaiser also purchased substantial quantities of asbestos-containing materials from other manufacturers, including Dexter (TR, 1403:3-12, 23-26), to which Mr. Gaylord may have been exposed.

3. The Plaintiffs' Case for Liability Against BP Chemicals

The plaintiffs' theory of liability against BP Chemicals was that Mr. Gaylord was exposed to U.S. Polymeric's asbestos-containing tape at Kaiser, and that these exposures combined with his cigarette smoking to cause lung cancer. In defense, BP Chemicals contended that Mr. Gaylord's cancer was caused by cigarette smoking alone, and that, in any event, U.S. Polymeric did not supply Kaiser with the asbestos-containing products that allegedly contributed to his injuries. As an affirmative defense, BP Chemicals also presented the "government contractor defense" recognized by the United States Supreme Court in the leading case of *Boyle v. United Technologies* (1988) 487 U.S. 500.

The plaintiffs' medical experts, including epidemiologist Dr. Alan Smith, pulmonologist Dr. Barry Horn and pathologist Dr. Samuel Hammar, agreed that the combined effect of cigarettes and asbestos, and not asbestos alone, was the medical cause of Mr. Gaylord's lung cancer. (TR, 296:26-297:6 (testimony of Dr. Horn); TR, 51:13-512:22 (testimony of Dr. Smith); TR, 617:1-13 (testimony of Dr. Hammar)). These experts testified that exposures to asbestos and cigarette smoke, in combination, have a "synergistic effect" that increases the risk of contracting lung cancer several times over the sum of the risks of contracting

lung cancer from either source alone. (TR, 280:17-281:19). These experts also established that the synergistic effect of cigarette smoke and asbestos became generally known in the medical and scientific communities in the 1977-1980 timeframe, after Dr. Irving Selikoff of the Mount Sinai School of Medicine published initial reports of epidemiological studies of some 17,000 asbestos workers. (TR, 1538:12-28).[2]

Dr. Smith testified that the synergistic effect of cigarettes and asbestos elevated Mr. Gaylord's risk of lung cancer to 15-35 times the background rate. (TR, 524:10-12). According to Dr. Smith, Mr. Gaylord's risk of contracting lung cancer from smoking alone, based on his average consumption of three-quarters of a pack of cigarettes per day, was 7-7.5 times the background rate (TR, 549:3-6), while his asbestos exposure, of itself, elevated this risk by as little as 1.5 times (TR, 551:24-552:14). In Dr. Horn's opinion, Mr. Gaylord's cigarette smoking, alone, elevated his cancer risk up to 20 times the background rate. (TR, 344:13-22), Dr. Horn also testified that Mr. Gaylord's cigarette smoking, of itself, was sufficient to have caused his lung cancer, without any asbestos exposure. (TR, 296:26-297:1).

Dr. Horn also testified that the "gold standard" for determining whether a particular case of lung cancer was asbestos-related is whether a qualified pathologist has diagnosed the patient as having asbestosis, that is, asbestos-related scarring, in the lungs. (TR, 270:8-9). Dr. Horn's testimony was corroborated by Dr. Hammar, who testified that the presence of asbestosis is the most important factor

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[2]In other cases, the courts have recognized that knowledge of the synergistic effects of smoking and asbestos exposure was not generally known until the publication of "interim reports" of the Selikoff study in 1979-1980. *See, Mount Sinai School of Medicine v. American Tobacco Co.* (2d Cir. 1989) 866 F.2d 552-53.

in determining whether a lung cancer is asbestos-related. (TR, 617:22-619:20). This testimony was enormously significant in view of Dr. Hammar's testimony that his pathological examination of the lung tissue removed from Mr. Gaylord in his 1989 bronchoscopy and 1990 lobectomy did not reveal any asbestosis. (TR, 696:12-697:5 (examination of bronchoscopy tissue) TR, 692:27-693:12 (examination of lobectomy tissue). On this point, Dr. Hammar testified as follows:

> Q: Doctor, as a pathologist you can make a diagnosis of asbestosis based solely on the pathology slides, correct?
>
> A. You can, yes.
>
> Q: And based on your examination of the pathology slides in Mr. Gaylord's case, you could not make that conclusion —
>
> A: That's correct.
>
> * * *
>
> Q: In the absence of a competent pulmonologist finding clinical asbestosis, you could not conclude that Mr. Gaylord's lung cancer was caused by asbestos, correct?
>
> A: That's correct.

(TR, 695:6-11; 696:4-7).

4. BP Chemicals' Defenses

In defense, BP Chemicals contended that Mr. Gaylord's lung cancer, like more than 90 percent of all lung cancers (TR, 950:12-16), was caused by cigarette smoking alone. This evidence included the undisputed absence of asbestosis in Mr. Gaylord's lung tissue, as established by the plaintiffs' medical experts and as corroborated

by Dr. Colleen Bergin, a board certified radiologist. Dr. Bergin testified that a high-resolution CT scan of Mr. Gaylord, conducted in 1989, did not detect any asbestos-related injuries. (TR, 889:13-893-16).

BP Chemicals also relied on the evidence that U.S. Polymeric did not supply Kaiser with any products containing crocidolite, the form of asbestos that the plaintiffs claimed had contributed to Mr. Gaylord's lung cancer. Finally, BP Chemicals relied on the fact that it did not supply any of the asbestos-containing products used on the Advanced Minuteman or Minuteman missiles, the programs on which practically all of Mr. Gaylord's asbestos exposures at Kaiser occurred.

BP Chemicals also contended that the government contractor defense shielded it from liability for the plaintiffs' claims. As set forth more fully herein, under this defense, government contractors may be immune from state-law tort claims, provided the government approved the design of the product, the product was manufactured in conformity with the approved design, and the contractor warned the government about hazards known to the contractor but not to the United States. *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 512. However, the trial court struck this defense after ruling that the government contractor defense only applies to "military" products, and that U.S. Polymeric's asbestos-containing tape was not "military."

II. ISSUES ON APPEAL

BP Chemicals contends that several errors occurred during the trial, which, independently or together, require remanding this matter for a new trial:

1. The jury's finding that U.S. Polymeric's products injured Mr. Gaylord was not supported by substantial evidence. The evidence that Mr. Gaylord's lung cancer was caused solely by cigarette smoking was

overwhelming. Moreover, even if Mr. Gaylord's cancer were asbestos-related, the great majority of his exposure were to the products of manufacturers other than U.S. Polymeric. Finally, U.S. Polymeric did not supply Kaiser with any products containing crocidolite, the specific form of asbestos that allegedly contributed to Mr. Gaylord's lung cancer.

2. The court erred in striking the government contractor defense. This defense barred the plaintiffs' design defect claims as a matter of law or, at a minimum, created factual issues for the jury to consider.

3. The jury's finding that U.S. Polymeric breached a duty to warn Mr. Gaylord was not supported by substantial evidence. It was undisputed that U.S. Polymeric could not have known of the synergistic effect of cigarette smoking and asbestos exposure before 1975, when it stopped manufacturing asbestos-containing products. Moreover, there was no evidence that any warning U.S. Polymeric could have given would have reached Mr. Gaylord.

4. The damages awarded for Mr. Gaylord's future medical expenses were excessive. As noted above, the jury awarded $177,000 for future expenses, although the undisputed evidence was that Mr. Gaylord's major expenses were behind him.

5. The trial court erred in "reverse bifurcating" the trial. This biased the jury against BP Chemicals and prevented it from fully presenting its case for contributory negligence. This resulted in prejudice and a violation of BP Chemicals' right to due process.

III. THE JURY'S VERDICT THAT MR. GAYLORD WAS INJURED BY U.S. POLYMERIC'S ASBESTOS-CONTAINING PRODUCTS WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The jury's verdict must be overturned where, as in the instant matter, it is not supported by substantial evidence. *Southern Christian Leadership Conference of Greater Los Angeles v. Al Malaikah Auditorium Co.* (1991) 230 Cal.App.3d 207, 221; *All Bay Mill & Lumber Co.* (1989) 208 Cal. App.3d 11, 16. For evidence to be "substantial," it must be relevant and must provide an adequate, logical basis for the jury's conclusion. *Sanders v. Parker Drilling Co.* (9th Cir. 1990) 911 F.2d 191, 193-94, *cert. denied*, 111 S.Ct. 2014 (1991) (applying California law).

BP Chemicals contends that there was not substantial evidence supporting the jury's verdict that Mr. Gaylord suffered an injury from exposure to U.S. Polymeric's asbestos-containing products. As set forth below, the overwhelming evidence was that Mr. Gaylord's lung cancer was caused solely by cigarette smoking, and not, as the jury found, by the combined effect of cigarette smoking and asbestos exposure. Moreover, the undisputed evidence was that the products that U.S. Polymeric supplied to Kaiser did not contain crocidolite, the form of asbestos that the plaintiff contended had caused his lung cancer, and that the vast majority of asbestos-containing products to which Mr. Gaylord was exposed were supplied by manufacturers other than U.S. Polymeric. Consequently, the Court should overturn the verdict on the basis that it was not supported by substantial evidence.

A. The Overwhelming Evidence Was That Mr. Gaylord's Lung Cancer Was Caused Solely by Cigarette Smoking

The undisputed evidence at trial was that more than 90 percent of all lung cancers are attributable to smoking alone (TR, 950:12-16), and that Mr. Gaylord had a smoking history that elevated lung cancer risk by as much as 20 times. (TR, 344:13-345:1). It was also undisputed that the "gold standard" for determining whether a particular case of lung cancer is asbestos-related is whether a competent pathologist has detected asbestosis in the patient's lungs. (TR, 270:8-9).

However, as described above, asbestosis was never detected in Mr. Gaylord's lungs. The plaintiffs' expert Dr. Hammar examined the tissue removed from Mr. Gaylord in his 1988 bronchoscopy and 1990 lobectomy, and failed to find asbestosis. Correspondingly, Dr. Bergin's analysis of Mr. Gaylord's high-resolution CT failed to detect any asbestos-related injuries. Furthermore, not one physician who treated Mr. Gaylord ever diagnosed him as suffering from any asbestos-related disease. (TR, 975:10-976:3).

Based on this evidence, Dr. Robert Morgan, a defense expert in occupational diseases and epidemiology, concluded that asbestos exposure did not contribute to Mr. Gaylord's lung cancer. (TR, 976:27-977:2). Dr. Morgan's opinion was corroborated by the plaintiffs' expert Dr. Horn, who testified that Mr. Gaylord's cigarette smoking, alone, was sufficient to have caused his cancer. (TR, 296:26-297:1). Dr. Morgan's opinion was also corroborated by Dr. Hammar, who testified that his examination failed to support the conclusion that Mr. Gaylord's lung cancer was asbestos-related. (TR, 692:27-697:6). Consequently, there was simply no substantial evidence on which the jury could have found that Mr. Gaylord's lung cancer was asbestos-related.

B. U.S. Polymeric Did Not Manufacture Any Asbestos-Containing Products That Might Have Contributed to Mr. Gaylord's Lung Cancer

The plaintiffs' theory at trial was that Mr. Gaylord's cancer was contributed to by crocidolite, the most carcinogenic form of asbestos. (TR, 193:6-17; 202:15-26). This theory was shared by Dr. Morgan, who testified that the plaintiff's medical records indicated crocidolite exposure. (TR, 1004:25-1005:4). Dr. Morgan also testified that crocidolite is the most carcinogenic form of asbestos. (TR, 1004:7-10).

However, it was undisputed that U.S. Polymeric did not supply Kaiser with any products containing crocidolite, and that the only asbestos is U.S. Polymeric's tape was chrysotile. (TR, 1587:23-1588:2). Therefore, even if asbestos exposure contributed to Mr. Gaylord's lung cancer, there was no evidence from which the jury could conclude that U.S. Polymeric's products were responsible.

Moreover, the undisputed evidence at trial was that the overwhelming majority of asbestos-containing products to which Mr. Gaylord was exposed were supplied by manufacturers other than U.S. Polymeric. U.S. Polymeric's tape was only qualified for use on the Poseidon program, on which Mr. Gaylord did little work, and the Polaris program, on which Mr. Gaylord did not recall working at all. Instead, the overwhelming majority of Mr. Gaylord's asbestos exposure occurred on the Advanced Minuteman and Minuteman programs, in which he machined "thousands and thousands" of parts containing asbestos products manufactured by others.

Further, in verified interrogatory responses that were read to the jury, Mr. Gaylord had stated that he had also been exposed to a laundry list of asbestos products including asbestos mud, cloth, pipe covering, cement, insulation pads,

paper, gaskets, manhole and handhold covers, other asbestos insulation, powder, insulated wire, sheets, wallboard, bricks, insulation bricks, construction products, friction products and insulated foam. (TR, 1338:6-1345:4). U.S. Polymeric did not manufacture any of these products. (TR, 1585:22-1587:22).

Consequently, there was no substantial evidence to support the jury's finding that U.S. Polymeric's asbestos-containing tape caused Mr. Gaylord's lung cancer. As set forth above, the overwhelming evidence was that Mr. Gaylord's lung cancer was caused solely by cigarette smoking, and, even if asbestos contributed, the specific form of asbestos responsible was crocidolite, which U.S. Polymeric did not supply. Moreover, the evidence also showed that, even if Mr. Gaylord was exposed to U.S. Polymeric's asbestos-containing products, these exposures provided only a fraction of his total asbestos exposure. Consequently, the Court should overturn the jury's verdict.

IV. THE GOVERNMENT CONTRACTOR DEFENSE BARRED PLAINTIFFS' DESIGN DEFECT CLAIM

One of BP Chemicals' defenses at trial was that the government contractor defense recognized by the United States Supreme Court in *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500 (hereinafter, "*Boyle*"), barred the plaintiffs' claims. However, the court denied BP Chemicals' motion for a directed verdict based on this defense, and, instead, struck the government contractor defense on the plaintiffs' motion. The court's reasons for striking the defense were that the government contractor defense only applies to "military" products, and that U.S. Polymeric's asbestos-containing tape was not a "military" product. (TR, 1660:8-1663:7). The court's finding that the asbestos-containing tape was not "military" was based on the fact that it

was developed prior to U.S. Polymeric's involvement with government missile programs, and the possibility that small quantities of the tape might once have been sold to the commercial aerospace industry. *Id.*

BP Chemicals contends that the court erred in refusing to direct a defense verdict on the application of the government contractor defense to the plaintiffs' design defect claim, and in directing a verdict for the plaintiff that the defense did not apply. As set forth herein, the instant lawsuit involves the United States' selection of the appropriate design for "military" equipment, and, therefore, the government contractor defense applies. Moreover, BP Chemicals submitted undisputed evidence in support of every element of the defense. Therefore, the court should have granted BP Chemicals' motion for a directed verdict on the plaintiffs' design defect claims or, at least, should have ruled that the application of the defense was for the jury to determine.

A. The Government Contractor Defense Applies Where, as Here, a "Significant Conflict" Exists Between the Government's Interest in the Procurement of Military Products and State Products Liability Law

Where its conditions are met, the *Boyle* "government contractor defense" bars the application of state products liability laws to government contractors and subcontractors. *Boyle*, 487 U.S. at 512; *Lewis v. Babcock Industries, Inc.* (2d Cir. 1993) 985 F.2d 83, 85, (defense applied to subcontractor); *Ramey v. Martin-Baker Aircraft Co.* (4th Cir. 1989) 874 F.2d 946, 948 (same). The defense operates by displacing state tort law with federal common law in appropriate cases. *Boyle*, 487 U.S. at 512. When the defense is established, government contractors and subcontractors are held immune from state tort liability to the same extent that the

government would be immune had it manufactured the product itself. *Id.*

To qualify for protection under *Boyle*, the defendant must show that the government's "uniquely federal interest" in the defendant's performance under a federal procurement contract, *Boyle*, 487 U.S. at 505, is in "significant conflict" with the contractor's duty to provide products that are deemed safe under state products liability laws. *Boyle*, 487 U.S. at 507. This "significant conflict" is found when two conditions are satisfied: first, the government's approval of the appropriate design for the product at issue is a protected "discretionary function" within the meaning of the "discretionary function exception" to the Federal Tort Claims Act (FTCA)[3]; and, second, the government's ability to procure the product would be "frustrated" were the manufacturer subjected to state products liability law in suits related to the product. *Boyle*, 487 U.S. at 511, *quoting*, 28 U.S.C. § 2680(a).

Accordingly, in *Boyle*, the Supreme Court found that the government's procurement of "military" products was a discretionary function that would be frustrated were state law applied in products liability suits against the manufacturers of these products. *Boyle*, 487 U.S. at 511. In that case, involving a death allegedly caused by the defective design of a military helicopter, the Court found that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function" because it involves "judgments as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety

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[3] The discretionary function exception prevents the courts from asserting jurisdiction over "[a]ny claim . . . based upon the exercise or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

and greater combat effectiveness." *Id.* at 511-12. To determine when the federal government's ability to procure appropriate military products would be "frustrated" by the application of state products liability law in a lawsuit, the Supreme Court adopted the following three-pronged test:

> (a) the government must have approved "reasonably precise specifications" for the design of the product at issue;
>
> (b) the product, as manufactured, must have "conformed to those specifications;" and
>
> (c) the supplier warned the government about any dangers in the use of the product "that were known to the supplier but not to the United States."

Boyle, 487 U.S. at 512. Accordingly, establishing the presence of a "significant conflict" under *Boyle* involves two factors. First, the state tort law under which a plaintiff seeks recovery must implicate a discretionary government function. Second, the three-pronged test set forth in *Boyle* must be satisfied.

At trial, BP Chemicals submitted undisputed evidence to establish that the government contractor defense applied in this case. First, to establish that the decisions regarding the use of U.S. Polymeric's asbestos-containing tape in the Polaris and Poseidon missiles were protected, discretionary functions, BP Chemicals established that the selection of these products for their ablative qualities was specifically approved by the government. Second, there was no dispute that both the missiles and the tape supplied by U.S. Polymeric were manufactured in conformity with their design specifications. Third, BP Chemicals submitted undisputed evidence that the government knew of all relevant asbestos hazards before entering the procurement contracts, relieving U.S. Polymeric of any duty to warn.

However, after hearing the evidence, the trial court struck the government contractor defense on the erroneous basis that the asbestos-containing tape was not a "military" product. (TR, 1663:5-7). In doing so, BP Chemicals contends the trial court committed at least two separate errors: first, the court adopted the erroneous legal view that the government contractor defense focuses on the individual component part at issue in a lawsuit, rather than the product procured by the government; and second, even if the court's narrow focus on component parts were proper, the court erroneously ruled that the asbestos-containing ablative tape was not a "military" product. (TR, 1660:14-21, 1661:12-17, 1662:14-16). But for these errors, BP Chemicals contends, the undisputed evidence would have compelled the court to direct a verdict in its favor on the plaintiffs' design defect claim, or, at least, to rule that the application of the government contractor defense was for the jury to determine.

1. The Trial Court Erred in Ruling That the Instant Lawsuit Did Not Involve the Design of "Military" Products

The trial court struck the government contractor defense on the basis that U.S. Polymeric's asbestos-containing tape was not a "military" product because: (a) it had been developed prior to U.S. Polymeric's involvement with government missile programs; and (b) because small quantities may have been sold to commercial aerospace manufacturers. BP Chemicals contends that the trial court erred in improperly focussing its inquiry under *Boyle* on the particular parts of the missiles on which the plaintiffs focussed their design defect claims, rather than the missiles themselves, which were the products procured by the government. In the alternative, even if the trial court's focus were correct, the court erred in ruling that U.S. Polymeric's tape was not a "military" product.

a. The Trial Court Erred by Focusing Its Inquiry on the Tape Products Supplied by U.S. Polymeric Instead of the Missiles Procured by the Government

The trial court erred in focussing its inquiry on the issue of whether U.S. Polymeric's asbestos-containing tape was a "military" product, rather than focussing on the Poseidon and Polaris missiles on which the tape was used, which clearly were military products.

This exact issue was held as dispositive in *Niemann v. McDonnell Douglas Corp.* (S.D. Ill. 1989) 721 F.Supp. 1019. In that case, the plaintiff contended that the government contractor defense did not apply to her wrongful death action, which arose from the exposure of her decedent, an aircraft mechanic, to asbestos-containing materials used in several of the defendant's military aircraft designs. *Id.* at 1021-22. In granting summary judgment for the defendant, the court squarely rejected the plaintiff's contention that the defense was inapplicable because the asbestos strips were not "military," but, instead, were "commercial, stock products":

> The plaintiff further urges that the government contractor defense is inapplicable in that the asbestos containing product was of such a commercial nature that there can be no federal interest, and thus no conflict exists between federal and state law. The plaintiff argues that the government must have a significant interest in the particular feature it ordered the contractor to make. (citation omitted). As previously stated, the particular products at issue in the instant case are the aircraft themselves and not, as plaintiff urges the court to find, the pieces of asbestos that was [sic] a component of the aircraft.

Id. at 1023.

Moreover, in every located case that has expressly decided this issue, the courts have uniformly ruled that the correct focus for determining whether a "military" product is involved is on the product as a whole acquired by the government, not the specific part a plaintiff claims was defective. *See: In re Aircraft Crash Litigation Frederick Maryland* (S.D. Ohio 1990), *aff'd sub. nom Darling v. Boeing Co.* (6th Cir. 1991) 935 F.2d 269 (table) (government contractor defense applied to "non-specified equipment on the aircraft" because government "approved the Detail Specification for the aircraft as a whole"); *Smith v. Xerox Corp.* (5th Cir. 1989(866 F.2d 135, 138; *Maguire v. Hughes Aircraft Corp.* (D.N.J. 1989) 725 F. Supp. 821, 823-24, *aff'd*, (3d Cir. 1990) 912 F.2d 67; *Wilson v. Boeing Co.* (E.D. Pa. 1987) 655 F.Supp. 766, 773.

Had the trial court not committed this error, it clearly would have held that the plaintiffs' lawsuit involved "military" products. Here, as in the cases cited above, the plaintiffs' claims involved the design of dedicated military hardware. The fact that the foregoing cases involved military airplanes (*Niemann, In re Aircraft Crash at Frederick Maryland*) and helicopters (*Boyle*), while the instant case involves missiles, does not make any difference with regard to the application of the government contractor defense to plaintiffs' design defect claims.

b. In the Alternative, the Trial Court Erred by Ruling that the Tape Was Not a "Military" Product

In the alternative, even if the trial court's narrow focus on the design of U.S. Polymeric's asbestos-containing tape were proper, the court nevertheless erred in ruling that the tape was not a "military" product. A product is "military" for purposes of the government contractor defense so long as it was selected by the government because of qualities that

served the military's purposes. This is true regardless of whether the product was developed before the contractor's involvement in military procurement programs. Furthermore, the defense applies even though a product was sold commercially, so long as the commercial sales were no more than "incidental." Therefore, the trial court erred, regardless of which basis for its ruling was dispositive.

(1) A Product Is "Military" if It Was Selected by the Government Because of Qualities That Served The Military's Purposes, Even Though It Was Developed Before the Contractor's Involvement in Military Programs

For purposes of the government contractor defense, a product is "military" if it was "produced according to military specifications and used by the military because of particular qualities which serve a military purpose." *Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1319. In the instant case, U.S. Polymeric's director of technical support, Don Beckley, established through uncontroverted testimony that the tape was manufactured according to detailed military specifications. (TR, 1515:27-1516:5, 1596:18-22). Mr. Beckley also testified that the tape was selected for use in the Poseidon and Polaris because its ablative qualities were required to protect the rocket motors and thrust nozzles of the missiles from damage. (TR, 1594:24-1595:28). The military required the use of asbestos-containing tape in these missiles because it was the best material available at the time. (TR, 1608:7-9). Hence, the evidence was undisputed that the tape was a "military" product under the test set forth in *Jackson v. Deft.*

So long as these factors are satisfied, it is simply irrelevant to the government contractor defense that the product at issue was originally developed before the contractor's involvement in military programs. *In re Brooklyn Navy*

Yard Asbestos Litigation (2d Cir. 1992) 971 F.2d 831, 839 (affirming defendants' summary judgment on design defect claims in cases involving "off the shelf" asbestos products). Clearly, the government's interest in military procurement would be ill-served were contractors required to "reinvent all components of a custom-designed vehicle," or to develop all parts "from scratch" to qualify for the government contractor defense. *In re Chateaugay Corp.* (S.D.N.Y. 1991) 132 B.R. 818, 824 (defense applicable to previously designed fuel system incorporated into government-procured vehicle). Hence, the court erred if it held as dispositive the fact that U.S. Polymeric originally developed the asbestos-containing tape before its involvement in the missile procurement programs.

(2) The Fact That a Product Was "Incidentally" Sold Commercially Does Not Affect its "Military" Status

Moreover, the fact that the product at issue was sold on the commercial market does not affect its "military" status under the government contractor defense, so long as the commercial sales were only "incidental" to the sales to the government. *Jackson v. Deft* 223 Cal.App.3d at 1319 (rejecting view that "military equipment means a product made exclusively for military use with no commercial purpose"). Instead, the military status of a product is only affected when the majority of a manufacturer's sales are commercial rather than military. *In Re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 813 (defense inapplicable where "the military constituted a relatively insignificant purchaser," and product was "primarily sold to private companies"); *Dorse v. Armstrong World Industries, Inc.* (Fla. 1987) 513 So.2d 1265, 1269. Consequently, the fact that U.S. Polymeric's asbestos-containing tape may have been incidentally sold on the commercial market does not affect its status as a "military" product.

In the instant case, it was undisputed that U.S. Polymeric's asbestos-containing tape was manufactured almost exclusively for use in military programs. For example, Mr. Beckley testified that, in the 1960s, some 75 to 90 percent of U.S. Polymeric's *total* sales were to missile contractors, of which only one to three percent were of asbestos-containing materials. (TR, 1574:6-12; 1590:12-28; 1609:22-24). Although U.S. Polymeric also supplied tape products to the commercial aerospace industry (TR, 1604:4-9), the commercial industry purchased fiberglass or other non-asbestos products almost exclusively. (*Id.*; TR, 1631:3-8). This was because asbestos was only useful as an ablator, which the commercial aerospace industry did not need. (TR, 1602:6-13). Consequently, very little, if any, asbestos-containing products were sold by U.S. Polymeric outside of the military defense industry. As discussed above, these "incidental" sales of asbestos-containing materials, if any, do not affect the application of the government contractor defense to this case.

2. *All of the Elements of the Boyle Defense Exist In This Case*

Moreover, U.S. Polymeric submitted undisputed evidence in support of each element of the three-pronged test adopted in *Boyle*. As set forth below, the government specifically required U.S. Polymeric's tape, which itself was produced in accordance with detailed government design specifications, to be used on the Poseidon and Polaris missiles, and the tape was manufactured in accordance with the government's specifications. Moreover, the government's knowledge of asbestos hazards at the time it procured the tape was far superior to U.S. Polymeric's, relieving U.S. Polymeric of any duty to warn the government.

a. The Government Approved the Design of U.S. Polymeric's Tape and Required It to Be Used on the Poseidon and Polaris Missiles

The government's approval of "reasonably precise design" specifications required by *Boyle* is established where, as in the present case, the specifications for the missiles on which U.S. Polymeric's products were used resulted from "back and forth" discussions between the government and its contractors, with the government giving final approval of the design, including the materials to be used. *Harduvel v. General Dynamics Corp.* (11th Cir. 1989) 878 F.2d 1311, 1320, *cert. denied*, (1990) 494 U.S. 1030, *reh. denied*, (1990) 495 U.S. 942, 110 S.Ct. 2199 (1990); *Koutsoubos v. Boeing Vertol* (3d Cir. 1985) 755 F.2d 353, 355. The government's approval of design specifications for U.S. Polymeric's tape is also established in this case, as U.S. polymeric "incorporated government specifications" into the design of the product, which "the government subsequently reviewed and approved." *Harduvel v. General Dynamics Corp.* 878 F.2d at 1320; *Smith v. Xerox Corp.* (5th Cir. 1989) 866 F.2d 135, 138.

At trial, Mr. Beckley testified at length regarding the design and development process involved in the Poseidon missile program, through which the government selected the materials that would be required for missile production, as a typical example of the government's management of missile programs. (TR, 1575:5-1578:26). This process began with the military's decision to develop a new missile with particular characteristics. (TR, 1575:9-15). The military then called in a prime contractor, who, in turn, sought subcontractors with expertise in various areas, including rocket propulsion. (TR, 1575:16-21). During this time, the contractors' suppliers, including U.S. Polymeric, would assist in identifying which of their products would be best for use in missile parts to be supplied, and would determine whether

new, improved materials could be developed. (TR, 1576:7-18). The government required these materials to be rigorously tested; for example, the U.S. Polymeric products that were used in rocket motor construction were subject to at least 120 motor test firings before receiving government approval. (TR, 1577:10-24).

Eventually, as a result of this back-and-forth process between the government and the contractors, the design of the missile, including materials specifications, was finalized into a government Weapon Specification. (TR, 1576:18-24). The Weapon Specification governing the design of the Poseidon missile was WS 8911. (TR, 1595:3). The Weapon Specification listed the exact materials that would become part of the "qualified products list" for manufacturing the missile's component parts. (TR, 1576:24-1577:1). Once the Weapon Specification was finalized, the suppliers, including U.S. Polymeric, were prohibited from deviating from its specifications either in the raw materials they used or in the process by which their products were made. (TR, 1577:24-1578:9). No changes were allowed. (TR, 1485:20-146:4; 1578:5-9). For example, when U.S. Polymeric decided to stop manufacturing asbestos products, it was required under federal law to continue supplying asbestos-containing tape when its product was the only one qualified for use on a missile program. (TR, 1593:2-1594:23).

Therefore, the government clearly approved reasonably precise design specifications for the products at the issue in this case. As set forth above, the design of the missiles in which U.S. Polymeric's tape was used were developed through a "back and forth" process between the military and its contractors, with the military exercising final design approval. Moreover, U.S. Polymeric's asbestos-containing tape was manufactured according to military specifications, and was subsequently reviewed and approved by the military for use in the missiles. Finally, the applicable Weapon

Specification prohibited U.S. Polymeric from deviating in the materials or processes used to manufacture its asbestos-containing tape. Hence, the first element of the *Boyle* test is clearly satisfied.

b. Both U.S. Polymeric's Tape and the Missiles in Which it Was Used Were Manufactured in Conformity With the Design Specifications

The second prong of the *Boyle* test requires that the contractor have supplied the product in conformity with the government-approved specifications. *Boyle*, 487 U.S. at 512. Product conformity can be established in several ways. First, conformity can be established by showing that the government accepted and used the finished product. *Smith v. Xerox Corp.*, 866 F.2d at 138-39; *Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. at 1337; *Hazard, Inc. v. Panco* (Va. 1990) 240 Va. 438, 397 S.E.2d 866, 868. Conformity also can be established when the government uses the product for several years, or performed inspections or maintenance and then returned the product to service. *Smith v. Xerox Corp.*, 866 F.2d at 138. Where, as in the present case, there is no contrary evidence, the courts have consistently accepted either one of these methods as sufficient to establish the second prong of the *Boyle* test. *See: Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. at 1027; *Smith v. Xerox Corp.*, 866 F.2d at 138-139.

In the instant case, the plaintiff did not submit any evidence that either the missiles or U.S. Polymeric's tape, as manufactured, deviated in any way from their design specifications. Instead, the plaintiff's case against U.S. Polymeric was based on the use of asbestos in U.S. Polymeric's tape, which was required by the government. Further, BP Chemicals introduced evidence that U.S. Polymeric's tape was inspected after delivery to Kaiser, to ensure it was suitable for use on the missile programs. (TR 1391:23-1393:2).

Accordingly, there is no dispute that the missiles in which U.S. Polymeric's tape was used were manufactured in conformity with their design specifications. Therefore, the second element of the *Boyle* test is satisfied.

c. Because the Government Had Superior Knowledge Regarding Asbestos Hazards, U.S. Polymeric Had No Duty to Warn

The third prong of the *Boyle* test requires that the contractor have warned the government of all dangers in the use of the product that were actually known to the contractor but not to the government. *Boyle*, 487 U.S. at 512. In establishing this prong, the Supreme Court squarely rejected the view that the contractor should also be required to warn of dangers of which it *should* have known. *Id.* Moreover, the third *Boyle* prong does not require the contractor to warn of dangers of which the government actually knew. *Stout v. Borg-Warner Corp.*, 933 F.2d at 336; *Trevino v. General Dynamics Corp.* (5th Cir. 1989) 865 F.2d 1474, 1487; *Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. at 1028.

In the instant case, it was undisputed that, throughout the 1960s, U.S. Polymeric did not know of the dangers associated with asbestos, and that, after learning of the hazard in the early 1970s, U.S. Polymeric began printing warnings on the packaging in which its asbestos-containing products were delivered. (TR, 1591:11-1593:26; 1614:24-1615:1). It was also undisputed that the government had knowledge of asbestos hazards from at least 1946 onward. (TR, 1444:2-20). Consequently, there is no dispute that U.S. Polymeric lacked any duty to warn the government of asbestos hazards, and, therefore, the third element of the *Boyle* test is satisfied as well.

3. But For Its Errors, the Trial Court Would Have Been Compelled to Rule That the Government Contractor Defense Applied to the Plaintiffs' Design Defect Claim, or, at Least, That the Issue Was for the Jury to Determine

As set forth above, had the trial court not erroneously ruled that the government contractor defense was inapplicable because U.S. Polymeric's asbestos-containing tape was not a "military" product, it would have been compelled by the evidence to rule that every element of the government contractor defense was satisfied in this case. Consequently, the trial court would have been required to direct a verdict in BP Chemicals' favor on the plaintiff's design defect claim, or, at least, to rule that the application of the defense was for the jury to determine.

V. THE JURY'S VERDICT THAT BP CHEMICALS BREACHED A DUTY TO WARN THE PLAINTIFF LACKS ANY FOUNDATION IN THE EVIDENCE

The trial court instructed the jury at length in the law to apply to the plaintiffs' failure to warn claim, as follows:

> A product is defective if the use of the product in a manner that is reasonably foreseeable by the defendant involves a substantial danger that would not be readily recognized by the ordinary user of the product and the manufacturer fails to give adequate warning of such danger.
>
> The manufacturer has a duty to provide an adequate warning to the consumer of a product of potential risks or side effects which may follow the foreseeable use of the product, and *which are known or knowable in light of the generally recognized and prevailing best scien-*

> *tific and medical knowledge at the time of manufacture and distribution.*
>
> In deciding whether defendants should be held strictly liable for the injury to the plaintiff, you are to focus on the condition of the asbestos-containing products themselves, and not on the reasonableness of defendant's conduct.
>
> *There is no requirement that a manufacturer must give a warning which could not be effective in lessening the plaintiff's risk of harm.*
>
> In a strict liability action, it is no defense that BP Chemicals had no actual knowledge the products were defective.

(TR, 1747:4-25; *emphasis supplied*).

Under this instruction, the jury found that BP Chemicals breached a duty to warn. (Phase II, Special Verdict No. 1(A)(1)). BP Chemicals contends that this finding was erroneous for at least two independent reasons.

First, the evidence was undisputed that BP Chemicals did not know, nor could it have known, of the specific hazard that caused Mr. Gaylord's lung cancer. The jury found that this hazard was the combined, synergistic effect of cigarette smoking and asbestos exposure, which multiplies the risk of cancer by several times above the risk created by either factor alone. However, the evidence was undisputed that this synergistic effect was not generally known or accepted in the scientific or medical communities until at least 1978, or three years after U.S. Polymeric stopped using asbestos materials in its products. Hence, there was no evidence from which the jury could have found this risk to be within BP Chemicals' duty to warn.

Second, the only reasonable inference from the evidence was that any warnings given by the U.S. Polymeric

would not have been passed on to Mr. Gaylord. Therefore, no warnings were required. For example, the undisputed evidence showed that U.S. Polymeric *did* provide warnings, from 1972 onward, and that none of these warnings reached the plaintiff. Moreover, throughout the entire period that U.S. Polymeric supplied asbestos-containing products, Kaiser was advising its employees that the materials to which he was being exposed were not harmful. (TR, 1297:2-3). Under this evidence, the jury could not reasonably have inferred that any warnings U.S. Polymeric could have given before 1972 would have reached the plaintiff. For this reason, too, the jury verdict on the plaintiff's failure to warn claim was flawed.

Each of these reasons is sufficient to show that BP Chemicals did not have a duty to warn of the danger that caused the plaintiff's injury. Consequently, the jury erred in finding for the plaintiff on his failure to warn claim.

A. BP Chemicals Did Not Have a Duty to Warn of the Synergistic Effects of Cigarette Smoke and Asbestos Exposure

The trial court instructed the jury that BP Chemicals only had a duty to warn of dangers that were "known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge at the time of manufacture and distribution." The court's instruction correctly emphasized the well-established rule that "knowledge, actual or constructive" of the specific hazard that caused a plaintiff's injury "is a requisite for strict liability for failure to warn." *Anderson v. Owens-Corning Fiberglass Corp.* (1991) 53 Cal.3d 9887, 1000.

In cases that, like the instant matter, involve injuries caused by the synergistic effects of two different substances, it is well-established that a duty to warn can only be found if the synergistic effect created by the substances, not just the

hazard of one substance alone, was within the manufacturer's reasonable knowledge. For example, in *Skill v. Martinez* (D.N.J. 1981) 91 F.R.D. 498, the court ruled that the pharmaceutical manufacturer involved in that case would only be held liable for failure to warn of the enhanced risk of stroke from smoking while taking oral contraceptives if contemporary medical studies had established the "link between smoking, the pill and strokes." *Id.* at 508-09. Likewise, in *Barry v. Don Hall Laboratories* (Ore.App. 1982) 642 P.2d 685, the court held that the defendant vitamin manufacturer would only have a duty to warn of the synergistic effects in promoting tooth decay of ascorbic acid combined with sugar if that risk was reasonably known in the manufacturer's industry at the time its sugar-coated vitamins were sold. *Id.* at 689.

As in the foregoing cases, in the instant matter BP Chemicals could only have been found liable for breaching its duty to warn if the jury found that it reasonably should have known of the synergistic effects of smoking and asbestos exposure. To do so, the jury would have had to find that knowledge of the synergistic effect was generally known and accepted in the medical and scientific fields at the time U.S. Polymeric sold asbestos-containing tape to Kaiser. However, the undisputed evidence, including the testimony of the plaintiff's own medical expert, established that this synergistic effect was not generally known or accepted by the medical or scientific professions until 1978 or 1979, after early accounts of the Selikoff study were published. (TR, 1538:12-28). Consequently, there was no evidence that U.S. Polymeric could have known of this danger at any time that it supplied asbestos-containing products to Kaiser. For this reason, the jury's verdict was erroneous.

B. No Evidence Exists That Plaintiff Would Have Received Any Warning That BP Chemicals Could Have Given

The court's instruction also correctly emphasized that BP Chemicals did not have a duty to warn if the warning would not have been "effective in lessening the plaintiff's risk of harm." *Rosburg v. Minnesota Min. & Mfg. Co.* (1986) 181 Cal.App.3d 726, 735. However, absolutely no evidence was introduced at trial from which the jury could find that any warnings U.S. Polymeric could have given would have reached the plaintiff. Indeed, all of the evidence was to the contrary. Therefore, the jury could not reasonably have found that any warnings that U.S. Polymeric could have given would have lessened the plaintiff's risk of harm.

In ruling on BP Chemical's motion for directed verdict on the government contractor defense, the court ruled that the military's specifications for the asbestos-containing tape prevented U.S. Polymeric from printing or attaching warnings on the product itself. (TR, 1662:25-27). At trial, BP Chemicals conceded that warnings could have been printed on the boxes in which the tape was delivered to Kaiser. Consequently, the only issue for the jury to consider was whether any warnings U.S. Polymeric could have printed on these boxes would have reached Mr. Gaylord and lessened his risk of harm. (TR, 1663:14-17).

However, the only evidence submitted on this issue showed that warnings on the boxes would not have reached Mr. Gaylord. Mr. Gaylord himself testified that he never saw the boxes. (TR, 1335:1-3). The undisputed evidence was that the boxes remained in Kaiser's store rooms, where workers repackaged asbestos-containing tape for distribution in plastic bags. (TR, 1391:10-1392:4). Most tellingly, even though U.S. Polymeric began printing warnings on the boxes in 1972, *these warnings never reached Mr. Gaylord.* (TR 1297):16-19). Although Mr. Gaylord also testified

that, after 1972, he "believed" he saw warnings "on some of the cans" containing asbestos materials (TR, 1297:4-10), the evidence showed that U.S. Polymeric did not package its tape in cans, but in boxes. (TR, 1390:21-26). Any "cans" Mr. Gaylord may have seen were not containers for U.S. Polymeric's products. Hence, even though U.S. Polymeric provided warnings during certain years of plaintiff's alleged exposure, these warnings were never communicated to him.

There was evidence that Gaylord's employer refused to warn its employees of the hazards of asbestos exposure, or even inform them that they were machining materials containing asbestos. (TR, 1328:7-8). Instead, even after the employees learned they were machining asbestos, Mr. Gaylord testified, Kaiser "constantly" told them "don't worry, none of this stuff can hurt you." (TR, 1297:2-3). Kaiser also told its employees that the asbestos dust in the area was only "nuisance dust" that was "within the quality control." (TR, 405:15-18). Also, with only a few, isolated exceptions, Kaiser told its employees that they did not need to wear respirator masks while machining asbestos-containing parts (TR, 405:19-406:1) because the asbestos was "encapsulated." (TR, 1325:9-1326:14).

Under strikingly similar circumstances, the courts have relieved product suppliers from the duty to warn, on the basis that the plaintiff's employer was the only party that could effectively communicate warnings to its employees.

For example, in *Goodbar v. Whitehead Bros.* (W.D. Va. 1984) 551 F.Supp. 592, *aff'd sub nom Beale v. Hardy* (4th Cir. 1985) 769 F.2d 213, the court held that a supplier of silica to a large, industrial foundry had no duty to warn the foundry's employees of silicosis hazards, because only the foundry could effectively communicate with its employees. *Id.* at 566. It would be improper, the court ruled, to

extend liability for the absence of warnings in the workplace to products suppliers, because doing so:

> has the unreasonable potential to impose absolute liability in those situations where it is impossible for the manufacturer to warn the product user directly. In the work place setting, the product manufacturer often cannot communicate the necessary safety information to product users in a manner that will result in a reduction of risk. Only the employer is in a position to ensure work place safety by training, supervision and use of proper safety equipment. Designating the manufacturer an absolute insurer of this product removes the economic incentives that encourage employers to protect the safety of their employees.

Id. at 566-67.

The court based its holding on numerous practical factors, including: (1) the difficulty the supplier would face in identifying the employees who were exposed to is products; (2) the fact that warnings printed on the railroad cars delivering bulk silica probably would not have been seen by workers inside the foundry; (3) the fact that only the foundry could provide the "continuous and systematic" housekeeping procedures, training and warnings "necessary to reduce the risk"; (4) the fact that, in any event, the supplier could only rely on the foundry to pass along warnings; (5) the "confusion" and disruption of work that would result if each of the foundry's several material suppliers had to instruct foundry workers personally; and (6) the impracticality of requiring suppliers to make regular visits to the foundry to educate workers. *Id.* at 566.

Significantly, every one of the factors the court held important in *Goodbar* exists in the present case. In both

cases, only the plaintiff's employer was in a position to identify exposed employees, and to communicate effectively with them. For example, the defendants in both cases necessarily relied on the employer to pass on warnings, and, in both cases, the employer failed to do so. In both cases, only the employer could establish the continuous, systematic procedures and educational programs that would be required to reduce the employees' risk from hazardous exposures. Finally, requiring suppliers, rather than the employer, to provide worker education would clearly have disrupted the workplace. Therefore, the court should apply the holding of *Goodbar* to the instant case, and hold that only Kaiser, not U.S. Polymeric, had the duty to warn the plaintiff of hazardous conditions there.

VI. THE DAMAGES WERE EXCESSIVE

BP Chemicals also contends that the damages award was excessive. Specifically, BP Chemicals contends that the jury erred in awarding the plaintiff $177,000 for future medical expenses. There was no substantial evidence that Mr. Gaylord would incur large future medical bills because of his lung cancer. Therefore, BP Chemicals contends that the Court should remand this matter for a new trial on the damages issue, or in the alternative, reduce the damages award to a more reasonable value.

The Court should hold that a damages award is excessive where, as here, the size of the award is grossly disproportionate in view of the evidence, indicating that it was based on passion or prejudice. *Saari v. Jongordon Corp.* (1992) 5 Cal.App.4th 797, 809. This test applies even though, as in the instant case, the trial court denied the defendant's motion for a new trial on the damages issue. *Las Palmas Assoc. v. Las Palmas Center Assoc.* (1991) 235 Cal.App.3d 1220, 1258. Particularly where, as here, an action has been consolidated with another lawsuit involving

serious injuries, the jury's award should be subject to heightened scrutiny because of the strong possibility that the jury "may be influenced, subconsciously perhaps, by the more serious injuries of one plaintiff in reaching its verdict in the case of the other." *Beker v. Waterman SS. Corp.* (S.D.N.Y. 1951) 11 F.R.D. 440, 441.

In the instant case, the jury's award for future medical expenses cannot withstand appellate review. The undisputed evidence was that Mr. Gaylord's past medical costs, from the date of his cancer diagnosis until trial, were only $57,000. Moreover, the evidence was undisputed that the great majority of Mr. Gaylord's probable medical expenses were behind him. For example, Dr. Hammar testified that Mr. Gaylord was ineligible for further radiation therapy because he had already reached his lifetime limit. (TR, 633:10-15). Further, Dr. Horn testified that Mr. Gaylord's future medical needs would only be for "follow-up" treatment, such as a chest X-ray every three months. (TR, 302:1-3). Dr. Horn further testified that Mr. Gaylord would only need extensive future treatment if his lung cancer were to recur, in which event chemotherapy might be an option. (TR, 302:3-13). Dr. Horn testified that chemotherapy usually caused serious complications and required multiple hospitalizations, *id.*, and its use would depend on how Mr. Gaylord "feels at the time." (TR, 302:5-6). These possibilities concerning future medical treatment, however, are not "substantial evidence." Therefore, the jury's award for future medical treatment was excessive.

VII. THE TRIAL COURT ABUSED ITS DISCRETION BY "REVERSE BIFURCATING" THE TRIAL, RESULTING IN PREJUDICE AND A DENIAL OF DUE PROCESS.

Finally, BP Chemicals contends that the trial court abused its discretion in bifurcating the trial by assigning the

issues of the plaintiff's damages and the medical causes of the plaintiff's injury to the first trial phase ("Phase I"), and the issues of BP Chemicals' liability and the plaintiff's contributory negligence to the second phase ("Phase II"). BP Chemicals contends that the bifurcation prevented it from properly presenting its case for the plaintiff's contributory negligence, and by prejudicing the jury against it. For these reasons, too, the Court should remand this matter for a new trial.

The trial court's discretion to bifurcate a matter for trial is limited to circumstances where bifurcation will "avoid prejudice," "further convenience," or be "conducive to expedition or economy." CCP sec. 1048(b). The rule is identical in pertinent part to Federal Rule of Civil Procedure 42(b). Under both rules, liability issues logically "must be resolved before damages are considered." *Kinnel v. Mid-Atlantic Mausoleums, Inc.* (3d Cir. 1988) 850 F.2d 958, 967 n.12, *quoting*, 9 Wright & Miller, Federal Practice and Procedure: Civil, sec. 2390 at 296 (1971).[4]

In addition to the statutorily prescribed requirements, the trial court is prohibited from bifurcating an action when the evidence to be introduced on the bifurcated issues is "so interwoven" that separate trials cause "confusion and uncertainty" for the jury. *United Air Lines, Inc. v. Wiener* (9th Cir. 1961) 286 F.2d 302, 306, *cert. denied* 366 U.S. 924.

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[4]The Code of Civil Procedure allows bifurcation under both sections 1048(b) and 598 (allowing bifurcation to promote "the convenience of witnesses, the ends of justice, or the economy and efficiency of handling of the litigation"). However, as section 598 only allows bifurcation on a noticed motion and hearing, which did not occur in this case, the bifurcation necessarily occurred pursuant to section 1048(b). As this statute "has produced little California authority on [its] scope or effect," 4 Witkin, California Procedure § 331 at 381 (1985), BP Chemicals contends that the court should consider as instructive cases decided under both FRCP 42(b) and CCP section 598.

Reversible error also exists when the bifurcation results in "the trial of a part of the issue of liability and a part of the issue of damages before the trial of another part of the issue of liability." *Cook v. Superior Court* (1971) 19 Cal.App.3d 832, 834.

In the instant case, the bifurcation was in excess of the trial court's discretion because it did not serve any of the statutorily prescribed goals, and because it constituted reversible error under both of the standards set forth above.

First the bifurcation prevented BP Chemicals from properly presenting its case on the plaintiff's contributory negligence in Phase II. BP Chemicals planned to elicit the testimony of Dr. Elliott Hinkes on the degree of the plaintiff's comparative fault for cigarette smoking. Dr. Hinkes's opinion, which was that Mr. Gaylord was principally at fault for causing his cancer, was based on his conclusion that cigarette smoking was the sole or primary cause of the cancer. (Defendant's Motion for Reconsideration re. Testimony of Dr. Elliott Hinkes, p. 3; Defendant's Motion for New Trial, p. 18). However, the court ruled that Dr. Hinkes could not testify about this conclusion, because it would have duplicated some of the comparative causation evidence presented in Phase I. (TR, 1268:4-16). Because the court's ruling would have deprived Dr. Hinkes of the opportunity to describe the basis for his opinion, BP Chemicals chose not to present his testimony.

Consequently, the bifurcation of this action prevented BP Chemicals from properly presenting its comparative negligence case, simply because some of the evidence relevant to both issues was the same. Therefore, because these issues were "so interwoven," the bifurcation constituted reversible error. *United Air Lines, Inc. v. Wiener*, 286 F.2d at 306. Moreover, as the degree of Mr. Gaylord's contributory negligence would be determined, in part, by the extent to which cigarette smoking caused his injury, the bifurcation

improperly required "the trial of a part of the issue of liability" to occur "before the trial of another part of the issue of liability." *Cook v. Superior Court*, 19 Cal.App.3d at 834. For this reason, too, the bifurcation was in excess of the court's discretion.

Finally, the reverse bifurcation clearly prejudiced the jury. After determining, in Phase I, that the plaintiffs had suffered enormous damages, the jury was practically compelled to return a verdict against the sole remaining defendant in Phase II. At best, therefore, the bifurcation resulted in "confusion and uncertainty" for the jury, *United Air Lines, Inc. v. Wiener*, 286 F.2d at 306, and, at worst, violated BP Chemicals' due process right to an impartial jury, *Jackson Water Works, Inc. v. PUC of State of Cal.* (9th Cir. 1986) 793 F.2d 1090, 1097. Consequently, the Court should remand this case for a unified retrial, or with an appropriate bifurcation between liability and causation in one phase, and damages in the other.

VIII. CONCLUSION

As set forth above, several errors occurred during the trial that warrant remanding this matter for a new trial. As BP Chemicals has shown, the jury's finding that U.S. Polymeric's products contributed to Mr. Gaylord's lung cancer is not supported by substantial evidence. Further, the government contractor defense clearly barred the plaintiffs' design defect claims, or, at least, the evidence created a jury question, and the jury's verdict on the plaintiffs' failure-to-warn claim was not supported by substantial evidence. Moreover, the jury's award for Mr. Gaylord's future medical expenses was clearly excessive, and the trial court erred in the manner in which it bifurcated the trial, prejudicing

BP Chemicals. For these reasons, BP Chemicals submits that this matter should be remanded for a new trial.

DATED:

KENNEY, BURD, KNUTSON & MARKOWITZ

BY: _____

Stephen C. Kenney
Jeffery J. Fadeff
Tom K. Hammitt
Attorneys for Defendant
Appellant and Cross-Respondent
BP CHEMICALS (HITCO)
INC.

APPENDIX 18

1 Civil No. A059183
(S.F. Super. Ct. No. 891562)

In the Court of Appeal
OF THE
State of California

FIRST APPELLATE DISTRICT
DIVISION FOUR

ROBERT AND JANET GAYLORD
Plaintiffs, Respondents and Cross-Appellants
vs.
BP CHEMICALS (HITCO) INC.
Defendants, Appellants and Cross-Respondents

OPENING BRIEF OF RESPONDENTS AND CROSS APPELLANTS

Appeal from Judgment on Jury Verdict of the
Superior Court of the State of California
in and for the City and County of San Francisco

Hon. Laurence Kay, Judge

Philip A. Harley, Esq.
BRAYTON, GRISVOLD
& HARLEY
999 Grant Avenue
P.O. Box 2109
Novato, CA 94948
Telephone: (415) 898-1555

Bryce C. Anderson, Esq.
LAW OFFICES OF BRYCE
C. ANDERSON
1985 Bonifacio Street
Suite 102
Concord, CA 94520
Telephone: (510) 686-2300

Attorneys for Plaintiffs, Respondents and Cross-Appellants

Duplication and binding by Zandonella Reporting Service, 2321 Stanwell Drive,
Concord, CA 94520 Telephone : (510) 685-6222

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1 Civil No. A059183
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IN THE COURT OF APPEAL
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Division Four

ROBERT and JANET GAYLORD,

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and Cross-Appellants,

vs.

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OPENING BRIEF OF RESPONDENTS AND CROSS-APPELLANTS

Appeal from Judgment on Jury Verdict of the Superior Court of the State of California in and for the City and County of San Francisco

Hon. Laurence Kay, Judge

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR:

Plaintiffs, respondents and cross-appellants herewith submit their opening brief in the above-entitled matter.

STATEMENT OF THE CASE

Defendant BP Chemicals, Inc. has appealed the judgment on jury verdict in favor of Robert and Janet Gaylord in a consolidated[1] asbestos-related personal injury action. A majority of its brief consists of an attack on the sufficiency of the evidence to support the findings of causation, liability and damages. These points are reviewed under the familiar substantial evidence test set forth in *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 [45 P.2d 183]. Defendant's contentions regarding the trial court order bifurcating the case are reviewable under the related abuse of discretion test described in *Brown v. Newby* (1940) 39 Cal.App.2d 615, 618 [103 P.2d 1018]. As plaintiffs will show, the judgment is amply supported on both points and defendants have effectively waived the very contentions they now make.

Defendant's only significant contention on appeal is that the trial court did not submit the issue of the military contractor defense to the jury. Although this issue of law is subject to review de novo on appeal, defendant has failed to make any showing of error. As will be shown, defendant's evidence taken by itself under the most liberal view fell substantially short of establishing the elements of the military contractor defense under *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500 [101 L.Ed.2d 442, 108 S.Ct.2510].

Plaintiffs have cross-appealed the trial court's order after judgment denying them prejudgment interest and expert witness fees under Code of Civil Procedure section 998. This ruling was made on the sole ground that plaintiffs' offer was too vague and therefore legally insufficient under section 998. Plaintiffs submit that this post-trial ruling was

---

[1] As the reporter's transcript indicates, the case of Robert and Janet Gaylord was consolidated with that of Marvard and Leona Casey.

in error, and as it involved no dispute of fact but only the application of legal rules, it should be reviewed de novo on appeal and reversed.

STATEMENT OF FACTS

A. Robert Gaylord's background and work history.

Robert Gaylord, who was 59 years old at the time of trial, was born and raised in Honolulu, Hawaii. [RT 353.][2] He and his wife Janet met at Kaiser Aerospace in San Leandro where he worked as a machinist and she worked as a documentation clerk, and the two were married in 1969. [RT 356, 741 to 743.] The couple have two children. [RT 355.]

Gaylord did not finish high school, but went to work in a machine shop in 1953. [RT 354 to 355.] He then joined Kaiser Aerospace in 1956 as a journeyman machinist running the lathes, mills, drills and surface grinder. [RT 356.] In 1958 he was transferred to the tracer lathe section where he worked from 12 to 14 hours a day, six or seven days a week. [RT 356 to 357.] Kaiser was making missiles at the time, and there were about 50 tracer lathes working in the section, each one about five to 12 feet from the next. [RT 359.]

Gaylord's job involved finishing the nose cones of missiles with lathe. [RT 189.] The nose cones were made of plastic impregnated with asbestos, and the lathe processing would release the asbestos fibers into the air. [RT 189 to

---

[2] The record consists of eight volumes of reporter's transcript and a joint appendix. The latter item has not yet been prepared and filed as of the date of filing this brief, and thus there are several record references to "J.A. ." The parties anticipate mutual stipulated requests to amend their briefs merely to insert the appropriate Joint Appendix page cites.

195.] Gaylord worked on thousands of missile nose cones at Kaiser from the 1950's to the 1980's and when he worked at the tracer lathe, the process would generate a great deal of dust. [RT 360 to 371.] During the 1950's the plant looked like a dust storm. [RT 374.] Although there were fans at the workplace, they just blew the dust around. [RT 371 to 373.] Even in the late 1960's when a new vacuum system was installed, it would frequently plug up when all the tracer lathes were working at once [RT 373 to 374.]

Johann Roel, a Kaiser Aerotech employee who worked with Gaylord, testified that on a normal day at Kaiser in the 1960's most of the machines were operating; the plant was operating four shifts with 35 people on the lathes. [RT 569.] Conditions were very dusty and even when the vacuum was installed, the dust sometimes blew from the vacuum back into the work area. [RT 570 to 571.] Roehl testified that when Gaylord worked as "lead man" and then supervisor, he still worked on the floor of the plant and not in an office. [RT 582.]

B. Diagnosis of cancer.

In addition to his work at Kaiser Aerospace, Robert Gaylord had run a karate school since the 1960's. [RT 375.] He also was the exercise coach for his daughters' soccer team [RT 748.] In the spring of 1987 he started to get colds that would not go away. [RT 385.] He consulted doctors who, after several visits, took x-rays which revealed that he had lung cancer. [RT 385, 748 to 749.] He had to take a leave of absence from work starting in August of 1987, and he quit altogether in 1988 because his doctors told him he was terminally ill and unable to work. [RT 375.] He also closed his karate school in September of 1988 because he was too ill to teach classes. [RT 380.] He has undergone radiation therapy for this cancer, but had a recurrence in 1990 which required surgery. [RT 293 to 295.]

C. Trial

As is apparent from the transcript, Robert and Janet Gaylord's case was consolidated for trial with the cases of other plaintiffs, and there were several defendants also involved. On the first day of trail the following exchange occurred between the trial court and the parties regarding bifurcation:

> THE COURT: ... So, shall we begin with the first phase motions in limine. It should come as no shock to anybody that I am going to bifurcate this case because of the smoking history aspect on the existence of a disease caused by asbestos and its value, if any.
>
> MR. MCLEOD: Your Honor, Bruce McLeod for ICI. We would oppose bifurcation in this case because, basically, the issue as to my client is one of — apart from the medicals, is one of product ID and exposure. And determination of that issue early on as to us would make it — well, make it cheap for us to try this case whereas, if we have to sit through four lung cancer cases and all the medical, it creates a substantial hardship and burden. For that reason, we object to it, reverse bifurcation.
>
> THE COURT: Your points are well taken, counsel, but as a judge, I have to consider the overall trial of this consolidated case. Denied.
>
> MR. FADEFF: Your Honor, Jeffrey Fadeff on behalf of BP Chemicals. I just want to joint (sic) in the objection, for the record.
>
> THE COURT: Very well, likewise denied.

[RT 17 to 18.] The trial was accordingly bifurcated, with the issues of medical causation (i.e. whether plaintiffs had asbestos-related diseases) and the amount of damages to be determined by the jury first.

1. Phase I — Existence of asbestos-related disease.

The first phase of the trial concerned the issue of whether Robert Gaylord suffered an asbestos-related disease. [J.A. .] Kenneth Cohen, an industrial hygienist, testified that although asbestos fibers are normally too small to be seen, they can become visible at extremely high concentrations. [RT 172.] At the level of visibility, there are as many as 60 to 100 fibers per cubic centimeter of air. [Id.] Thus, when a worker such as Robert Gaylord describes a workplace as having a "sustained fog" in the air, he is being exposed to asbestos fibers in a concentration of 60 to 100 fibers per cubic centimeter. [RT 172 to 173; 196.] Although asbestos is usually mixed with other materials in commercial applications, the asbestos fibers typically stay suspended in the air longer than the materials it is mixed with. [Id.]

Kenneth Cohen described how Robert Gaylord's job of finishing the nose cones of missiles with a lathe involved direct exposure to asbestos. [RT 189 to 192.] He noted that although the asbestos particles were originally encapsulated, the lathe process broke apart the plastic, releasing fibers. [RT 203.] He testified that even after some testing and safety changes in 1972, Gaylord's exposure was comparable to an asbestos textile worker, an insulator or one overhauling a ship. [RT 200 to 202.]

Dr. Barry Horn, a lung specialist, testified that there is a dose-response relationship between asbestos exposure and lung diseases, just as there is for other carcinogens. [RT 279.] He also testified that there is a synergistic relationship between smoking and asbestos exposure so that the risk of cancer from the combined exposures is substantially greater

than merely the sum of the two risks. [RT 280 to 283.] He further testified that one cannot separate the relative contributions between asbestos and smoking because the major risk is due to the biological interaction between the two. [RT 283.] Horn also testified that if an individual with asbestos exposure develops lung cancer, the asbestos exposure is a cause; in Gaylord's case, all of his exposure up to mid-1977 should be considered a contributing factor of his malignancy. [RT 287, 292.]

Dr. Allan Smith, an epidemiologist, testified that overwhelming evidence links occupational exposure to asbestos with the development of various cancers, including lung cancer, and that asbestos exposure can cause each of the major types of lung cancer. [RT 486 to 489.] He also testified that if a person with Gaylord's smoking history and exposure to asbestos developed lung cancer, the lung cancer was probably caused by both smoking and asbestos. [RT 511 to 512.] Moreover, in Dr. Smith's opinion, the cigarette smoking by itself cannot be said to have been sufficient to cause the lung cancer without the asbestos exposure.

Dr. Samuel Hammar, a pathologist, testified that asbestos exposure can cause all of the common types of lung cancer including the squamous cell carcinoma which Robert Gaylord has. [RT 613, 625.] He examined tissue taken from Gaylord's lung in the 1990 lobectomy and found that it showed recurrent squamous cell carcinoma and, in the part that was not cancerous, a great deal of fibrosis. [RT 625 to 626.] He testified that if a competent pulmonologist determined radiographically that Gaylord had asbestos-related fibrosis, then the lung cancer was related to the combined effects of asbestos and cigarette smoking. [RT 627.] He further testified that the amount of asbestos exposure incurred by Gaylord could itself cause lung cancer regardless of cigarette smoking. [RT 630.]

Dr. Hammar testified that Gaylord is at stage three of the cancer progression levels. [RT 631.] His chances of developing a recurrence of lung cancer are very high. [RT 631 to 633.] Dr. Horn testified that medical care could cost as much as $100,000.000 per year, and that if Gaylord had to undergo chemotherapy he would need a nurse at a cost of $150.00 for each eight-hour shift. [RT 302 to 303.]

The jury returned a verdict at the end of the first phase finding that plaintiff Robert Gaylord's lung cancer was caused in part by asbestos exposure and that no separate apportionment of causation could be made to cigarette smoking. [J.A.] Damages were set at $1,304,000.00 for Robert Gaylord and $200,000.00 for Janet Gaylord's loss of consortium claim. [J.A. .]

2. B. Phase II — Defendant's product as a contributing cause.

Robert Gaylord testified in the second phase that worked on the Advanced Minuteman missile from the middle of the 1960's into the 1980's. [RT 1293 to 1294.] He testified that various missiles were built using the "asbestos overwrap" system, and that in particular he machined about 80% to 90% of the minuteman missiles using the asbestos overwrap method. [RT 1294 to 1295.]

Bill Vida, who began with Kaiser Aerotech in 1955 as a machinist and then worked in production control from 1961 until he retired in 1991, was responsible for ordering materials for the plant. [RT 1389 to 1390.] He ordered various products from U.S. Polymeric including silicate materials and asbestos bypass tape, also known as ablative tape or "overwrap." [RT 1390 to 1391.] When these products were received they would be put in storage in their containers and later taken to the plastics department for wrapping. [RT 1391 to 1392.] The materials had a shelf life, indicated on

the rolls, and had to be used within a certain amount of time. [Id.]

The inspection department looked at the material from U.S. Polymeric when it arrived to verify the quantities. [RT 1392.] It then went through the plastic operation and was machined in a raw state by the machinists, who then cured the overwrap in its final configuration. [RT 1392 to 1393.]

The ablative materials from U.S. Polymeric were used on many programs including the Poseidon, the Trident, the Advanced Minuteman, the SRAM nozzle and the SRM-I AND SRM-II. [RT 1394.] Kaiser ordered materials on a monthly basis, and in the mid to late 1960s and into the 1970s there were thousands of pounds of the materials coming into the plant, mostly from U.S. Polymeric [RT 1394 to 1395.]

Vida had no knowledge of the dangers of asbestos in the 1960's and did not know that the materials from U.S. Polymeric contained asbestos. [RT 1396.] He never saw any warnings on the packages from U.S. Poly about the dangers of asbestos to workers. [Id.] There were no secrecy requirements regarding the contents of the materials being ordered, however, and no conflict in production requirements that would have prevented U.S. Polymeric from issuing warnings about the contents of the products that contained asbestos. [RT 1398.]

Following the presentation of evidence and argument the jury found that plaintiff had been exposed to defendant's products, that these products were defective and that defendant had failed to warn of the dangers involved in the use of its products. [J.A. .] The jury allocated 10% of the fault to plaintiff Robert Gaylord's comparative negligence in smoking, 25% to defendant's defective product and 65% to other causes. [Id.]

Following the verdict, plaintiffs made a motion for augmentation of costs and prejudgment interest under Code of Civil Procedure section 998. [J.A. .] The trial court denied plaintiffs' motion on the ground that the offer under section 998 was not legally sufficient. Defendant's subsequent motion for a new trial was denied. [J.A. .] Defendant appealed the resulting judgment, and plaintiffs have appealed the order denying them prejudgment interest and augmented costs. [J.A. .]

ARGUMENT

I.

INTRODUCTION

A considerable portion of the defendant's brief is devoted to an attack on the sufficiency of the evidence to support various parts of plaintiff's verdict. Defendant supports this attack with a recitation of the facts of the case which emphasizes only the evidence favorable to it. [Appellant's Opening Brief, pp. 3-10.] The following portion of the opinion in *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [92 Cal.Rptr. 162, 479 P.2d 362] is relevant to defendant's presentation:

> "It is well established that reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact." [Citations omitted.] Defendants' contention herein "requires defendants to demonstrate that there is *no* substantial evidence to support the challenged findings." [Italics original; citations omitted.] A recitation of only defendants' evidence is not the "demonstration" contemplated under the above rule. [Citation omitted.] Accordingly, if, as defendants here contend, "some particular issue of fact is not sustained,

> they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence.* Unless this is done the error is deemed to be waived." [Italics original; citations omitted.]

Although *Foreman & Clark* was a case tried to a court without a jury, the rule stated above is equally applicable to jury trials. See *Wickham v. Southland Corp.* (1983) 168 Cal.App.3d 49, 54 [213 Cal.Rptr. 825]. Defendant's failure to present all of the relevant evidence on the issues it raises should therefore be treated as a waiver of any contention regarding the sufficiency of the evidence.

Defendant has also sought reversal on the basis of the trial court's order "reverse bifurcating" the trial. On this point defendant has failed to meet its appellate burden of showing both error and prejudice. See California Const. Article VI § 13; Code of Civil Procedure § 475; Evidence Code § 354; *Vaughn v. Jones* (1948) 31 Cal.2d 586, 601 [191 P.2d 432]; 9 Witkin, *California Procedure* (3rd Ed. 1985) "Appeal", section 268, pp. 276 to 277 and cases cited therein. Its trial counsel raised no substantial objection to the bifurcation, and its contentions on appeal are nothing more than speculation.

II.

THE VERDICT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

As defendant all but ignores, the substantial evidence standard of review requires the appellate court to consider the evidence in light most favorable to the prevailing party, giving him or her the benefit of every reasonable inference, and resolving conflicts in support of the judgment. See 9 Witkin, *California Procedure* (3rd Ed. 1985) "Appeal" § 278, p. 289. Defendant has also given virtually no consid-

eration to the meaning of this standard of review. First, it is well settled that the test is whether the evidence favorable to respondent is legally sufficient to uphold a finding; the amount of conflicting evidence offered by appellant does not affect this analysis. See *County of Mariposa v. Yosemite West Associates* (1988) 202 Cal.App.3d 791, 807 [248 Cal.Rptr. 788] citing 9 Witkin, *California Procedure, supra* § 282 p. 293; see also *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544 [138 Cal.Rptr. 705, 564 P.2d 857] (appellate court does not usurp jury's function by reweighing evidence). Second, no particular volume of evidence is required to uphold a finding; a jury's decision may be upheld on the basis of the relevant testimony of a single witness, even the party himself, or on the basis of an inference from circumstantial evidence. 9 Witkin, *California Procedure, supra* § 281, pp. 292-293. In resolving conflicts in testimony in general, the jury may believe all of the testimony of one witness, or accept those parts of that witness' testimony which it believes to be true, and reject those parts which it believes to be false. *Whitechat v. Guyette* (1942) 19 Cal.2d 428, 434-435 [122 P.2d 47]. In cases in which expert testimony was offered, the jury is the sole judge of the credibility of these experts and the weight of their testimony. *Estate of Rowley* (1967) 257 CalApp.2d 324, 341 [65 Cal.Rptr. 139]. As noted in *McCarty v. City of Manhattan Beach* (1953) 41 Cal.2d 879, 890 [264 P.2d 932]:

> In the event of conflict, the law ordinarily makes no distinction between expert testimony and evidence of other character; either may be accepted by the trier of fact as the basis for findings on disputed issues.

Each of defendant's attacks upon the sufficiency of the evidence fails under these standards of review.

A. There was substantial evidence that asbestos exposure caused Gaylord's lung cancer.

Defendant's attempt to attribute Robert Gaylord's lung cancer only to smoking ignores much of the record. First, there was substantial evidence that Gaylord smoked only one-half of a pack of cigarettes a day, and not the two packs on which defendant bases its argument. [RT 288, 344, 383 to 384, 746.] Second, there was expert testimony regarding the synergistic effects of cigarette smoking and asbestos exposure; plaintiffs' three medical experts all testified that Robert Gaylord's asbestos exposure was a contributing factor to his lung disease. [RT 296, 511, 627.]. Third, there were findings from the CT scan of pleural disease attributable to prior asbestos exposure. [RT 297 to 298; 626 to 627.]

Plaintiffs' expert witnesses all took the position that cigarette smoking played a part in increasing Robert Gaylord's risk of lung cancer; indeed, the testimony regarding the synergistic effect between smoking and asbestos exposure necessarily implicates smoking as a cause. Defendant, however, seems to take the position that the jury had to find either that the lung cancer was caused only by smoking or that it was caused only by asbestos exposure. This, of course, is not so; it is sufficient if defendant's product was a concurring cause of plaintiff's injury. See generally, 6 Witkin, *Summary of California Law* (9th Ed. 1985) "Torts § 970 pp. 360-361 and cases cited therein. The evidence amply supported the jury's finding in plaintiffs' favor on this point.

B. There was substantial evidence of exposure to defendant's products and resulting injury.

There is no question that plaintiff Robert Gaylord was exposed to more than one asbestos product, and that many of those to which he was exposed were not manufactured by

U.S. Polymeric. Defendant, however, is attempting to convert evidence that it was not the sole cause of plaintiff's exposure into evidence that it was not a cause at all. This attempt should fail in light of the evidence in this case.

Defendant admitted at trial that between 1969 and 1975 it sold asbestos-containing products including "FM 5075 and FM 5076" to Kaiser Aerotech approximately 35 times. [RT 1413] Defendant also stipulated:

> Defendant is informed and beliefs (sic) that it supplied these products to Kaiser Aerotech before 1969, but specific information is unavailable. These products were prepreg, phenolic resin and phenylsilane resin impregnated onto asbestos felt, graphite, silicon, and/or silica fabric and/or roving for bias and/or unitape and/or broadgood production. The approximate percentage by weight of the reinforcements used in the specified production material was 45 percent. Defendant is informed and believes that any asbestos incorporated into these products was obtained from Raybestos Manhattan and/or Johns Manville.

[RT 1413.] When coupled with Bill Vida's testimony that "thousands of pounds" of materials from U.S. Polymeric in the late 1960's and 1970's, including ablative tape for a variety of missile programs, the jury had an ample basis for determining that there was a substantial amount of U.S. Polymeric's asbestos products used at Robert Gaylord's worksite.

Dr. Horn's testimony, which defendant seemingly ignores, was that asbestos disease is dose-related and that all of the plaintiff's exposure contributes to his disease. [RT 277 to 279, 292.] Plaintiff's medical witnesses all testified that his occupational asbestos exposure was a cause of his

lung cancer. [RT 296, 511, 627.] Additionally, there was testimony that workers such as plaintiff would be exposed to asbestos products even when they were not working with those products because the fibers can stay suspended in the air for a very long time. [RT 487.] This testimony was more than sufficient to support the jury's finding that defendant's products were a substantial factor in causing plaintiff's lung disease.

C. There was substantial evidence that defendant breached a duty to warn of the hazards of exposure to its products.

The evidence was undisputed that, although U.S. Polymeric may or may not have had the ability to print a warning directly on the ablative tape,[3] there were no restrictions whatsoever on defendant's ability to print warning labels on the packages in which the tape came. Citing *Rosburg v. Minnesota Mining & Mfg. Co.* (1986) 181 Cal.App.3d 726, 735 [226 Cal.Rptr. 299] defendant argues that the warnings would not have been likely to reach Robert Gaylord, and that it accordingly had no duty to warn. Defendant, however, overstates *Rosburg;* that case holds only that a warning "which *could not possibly* be effective in lessening the plaintiff's risk of harm" is not required. *Id.* at 735; emphasis added. Defendant's products came in packages and not in bulk on railroad tank cars, and there was no practical impediment to the giving of a warning printed on these packages.

There were inferences from the testimony of Bill Vida that a strong warning appearing on the packages of asbestos

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[3]Don Beckley, an employee of BP Chemicals, testified that there had been an "unwritten agreement" not to print anything directly on the tape. [RT 1596.] This is the first time that appellate counsel for plaintiffs has seen an "unwritten agreement" cited as a military specification in support of the military contractor defense.

tape would have come to his attention and, through him, to the other workers. Vida testified that in the 1960's he saw the packaging, that he did not know that the ablative tape contained asbestos or that asbestos was dangerous. [RT 1396.] He also testified that he knew Robert Gaylord and socialized with him. [RT 1399.] The jury could properly infer that if the packages had contained the appropriate warnings, Vida or somebody would have passed to word to Gaylord and the other workers.[4]

Defendant also argues that it had no duty to warn of the synergistic effect of cigarette smoking and asbestos exposure because this effect was not known until 1975. [Appellant's Brief, pp. 32-34.] This argument misses the point. Defendant, as a manufacturer of asbestos products, is held to the standard of an expert regarding the potential hazards from the use of these products. *Vermeulen v. Superior Court* (1988) 204 Cal.App.3d 1192, 1204 [251 Cal.Rptr. 805]. As plaintiff's expert Dr. Richard Cohen testified at length, there was ample literature going back three quarters of a century outlining the health hazards from asbestos exposure by itself. [RT 1426 to 1437; see Ex. 22.] By 1952 it was established that one did not actually have to work with asbestos to be exposed to the health risks, and by 1955 there was no doubt that asbestos caused cancer [RT 1427, 1437.] Although the exact method by which plaintiff was harmed may not have been known until later, this circumstance does not excuse defendant or prevent its conduct from being a proximate cause of plaintiff's injuries. See *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 152 [211 Cal.Rptr. 368, 695 P.2d 665].

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[4]Indeed, in an analogous case regarding lack of warnings the Supreme Court placed the burden of proof on the defendant to prove that the injury would have occurred anyway. See *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756, 769-775 [91 Cal.Rptr. 745, 478 P.2d 465].

In summary, there was ample evidence that knowledge of the hazards of asbestos exposure, including the risk of cancer, was well within the "state of the art" at the time that U.S. Polymeric was selling its products to Kaiser Aerotech. There is no contention that the use of ablative tape to overwrap missile parts or the subsequent lathe work to shape these parts was unforeseeable. Nevertheless, defendant placed no warnings on its products that the asbestos dust, if inhaled, could pose a substantial risk of serious harm. Defendant was properly held liable for the injuries resulting from the use of its products.

D. There was substantial evidence to support the damages awarded by the jury.

Defendant's only contention regarding the amount of damages is that the award of $177,000.00 for future medical expenses was excessive. [Appellant's Brief, pp. 37-39.] Basically, defendant seeks to limit plaintiff's future medical expenses to the $1,000.00 per year cost of monitoring his condition. [Appellant's Brief, p. 39.] Defendant ignores Dr. Horn's testimony that Robert Gaylord's cancer has metastasized and spread to other locations [RT 299] and Dr. Hammar's testimony that there is a very high chance that Gaylord will develop another tumor [RT 631 to 633]. This testimony satisfies the plaintiffs' burden of proof that it is "reasonably certain" that Robert Gaylord will incur medical expenses for a recurrence of his cancer in the future. See generally, *Augustus v. Shaffer* (1959) 171 Cal.App.2d 160, 165-166 [340 P.2d 37]. Dr. Barry Horn's testimony that medical expenses for this recurrence would cost $100,000.00 per year, plus nursing services running more than $50,000.00 per year [RT 302 to 303] is more than adequate to support the jury's award of a little more than one years' worth of future medical expenses.

III.

THE TRIAL COURT PROPERLY EXCLUDED THE MILITARY CONTRACTOR DEFENSE

At the beginning of the second phase of the trial, plaintiffs asked the court to obtain from defendants an offer of proof regarding the government contractor defense so as to preclude this issue. [RT 1246.] The trial court denied plaintiffs' motion and allowed defendant to present the defense in the regular course of the trial. [RT 1247 to 1249.] Following the presentation of all evidence, however, the trial court ruled that defendant's product did not meet the requirements of the military contractor defense. [RT 1660 to 1663.] That ruling was correct.

The military contractor's defense has its roots in the United States Supreme Court decisions immunizing an officer of the federal government from liability for acts done pursuant to express government authorization. See, e.g., *Den ex dem. Murray et al. v. Hoboken Land & Imp. Co.* (1855) 59 U.S. (18 How.) 272, 283 [15 L.Ed. 372] cited in *Yearsley v. W.A. Ross Constr. Co.* (1940) 309 U.S. 18, 21 [84 L.Ed. 554, 60 S.Ct. 413]. In *Yearsley*, the Supreme Court extended this rule to include those doing construction work under contract with the government. The Court's rationale was that the proper remedy was a suit against the government itself in the Court of Claims. *Yearsley, supra* at 21 to 22.

Later cases from various jurisdictions applied *Yearsley* to immunize manufacturers of military equipment from suits based upon allegations of product defect. In *Sanner v. Ford Motor Co.* (1976) 144 N.J.Super. 1 [364 A.2d 43] the court cited *Yearsley* and a line of cases following it to immunize an automobile manufacturer from a claim of

product defect for failure to install seat belts in a military jeep. The court stated:

> To impose liability on a governmental contractor who strictly complies with the plans and specification provided to it by the Army in a situation such as this would seriously impair the government's ability to formulate policy and make judgments pursuant to its war powers. The Government is the agency charged with the responsibility of deciding the nature and type of military equipment that best suits its needs, not a manufacturer such as Ford.

Sanner, supra, 364 A.2d at 47. See also *Casabianca v. Casabianca* (1980) 104 Misc. 2d 348 [428 N.Y.S. 2d 400] (dough mixer designed and manufactured expressly for military use). In *McKay v. Rockwell International Corp.* (9th Cir. 1983) 704 F.2d 444, a suit by widows of Navy pilots killed due to allegedly defective ejection mechanisms in military aircraft, the United States Court of Appeal noted that under *Feres v. United States* (1950) 340 U.S. 135 [95 L.Ed. 152, 71 S.Ct. 153] and *Stencel Aero Engineering Corp. v. United States* (1977) 431 U.S. 666 [52 L.Ed.2d 665, 97 S.Ct. 2054] the federal government had immunity both for direct tort liability and for indemnity. On the basis of the policies enunciated in the *Feres* doctrine cases, as well as those in *Yearsley*, the court held that a supplier of military equipment would also be immune, stating:

> To summarize, we hold that under the *Feres-Stencel* doctrine and the government contractor rule, a supplier of military equipment is not subject to section 402A liability for a design defect where: (1) the United States is immune from liability under *Feres* and *Stencel*, (2) the supplier proves that the United States established, or approved, reasonably precise specifi-

> cations for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States. The imposition of this duty to warn of known defects is necessary to enable the United States to balance the risks and benefits inherent in the use of the equipment. [Citations omitted.]
>
> We recognize that the term "military equipment" is somewhat imprecise, and that at some point lines will have to be drawn. We need not do so here. The line, however, lies somewhere between an ordinary consumer product purchased by the armed forces — a can of beans, for example — and the escape system of a Navy RA-5C reconnaissance aircraft. The latter falls within the term while the former does not.

See also *Tillett v. J.I. Case Co.* (7th Cir. 1985) 756 F.2d 591 and *McLaughlin v. Sikorsky Aircraft Co.* (1983) 148 Cal.App.3d 203 [195 Cal.Rptr. 764], citing and relying on *McKay* on this issue. Some courts altered the *McKay* formula by holding that the contractor could escape liability only if it proved that it participated only minimally, if at all, in the design of the product or part shown to be defective, that it timely warned the military of the risks and of alternative designs reasonably known to the contractor, and that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design. See, e.g., *Shaw v. Grumman Aerospace Corp.* (11th Cir. 1985) 778 F.2d 736 at 746.

In 1986, a series of cases were decided by the Fourth Circuit on this issue. See *Tozer v. LTV Corp.* (4th Cir. 1986) 792 F.2d 403, *Dowd v. Textron, Inc.* (4th Cir. 1986) 792 F.2d 409 and *Boyle v. United Technologies Corp.* (4th Cir. 1986) 792 F.2d 413. Each of these cases adopted the *McKay* formula, rejecting the approach taken in *Shaw*. The United States Supreme Court granted certiorari to resolve the conflict in the definition of the military contractor defense. In *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500 [101 L.Ed.2d 442, 108 S.Ct. 2510] the Court announced its decision, favoring the approach taken in *McKay* rather than that in *Shaw*, but clarifying the theoretical basis for the defense.

Boyle involved a suit against a military contractor for the death of a Navy helicopter pilot due to a defectively designed escape hatch. The Supreme Court initially held that, notwithstanding the absence of federal legislation immunizing military contractors from tort liability, the area of government procurement of military equipment is one involving a "uniquely federal interest" because it is related to two areas which are governed by federal law. The first area is that of the obligations to, and rights of, the United States under its contracts, and the second is that of civil liability of federal officials for actions taken in the course of their duty. Accordingly, this circumstance raised the question of whether a federal rule immunizing contractors should preempt state tort law. *Boyle, supra,* 101 L.Ed.2d at 452-454. Noting its holding in *Miree v. DeKalb County* (1977) 433 U.S. 25 [53 L.Ed.2d 557, 97 S.Ct. 2490] allowing private parties to sue as third party beneficiaries to enforce a contract with the federal government, the Court held that displacement of state law would occur only where a significant conflict exists between an identifiable federal policy or interest and the operation of state law, or the application of

state law would frustrate specific objectives of federal legislation. *Id.* at 454-455. The Court further stated:

> Between Miree and the present case, it is easy to conceive of an intermediate situation, in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed. If, for example, the United States contracts for the purchase and installation of an air conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context.

Id. The Court noted that in the case before it, the contractor's liability was based on a state law duty of care, i.e. to deliver a safe helicopter, which was contrary to the contractual duty, i.e. to deliver a helicopter according to specifications. *Id.* at 456.

The Supreme Court specifically held, however, that pre-emption was not necessarily required merely because the government ordered a specific product:

> Even in this sort of situation, it would be unreasonable to say that there is always a "significant conflict" between the state law and a federal policy or interest. If, for example, a federal procurement officer orders, by model number a quantity of stock helicopters that

> happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered.

Id. at 455-456. The Court also noted that it was not formulating a military contractor defense under the policy considerations which led to the *Feres-Stencel* doctrine, because servicemen should not be barred from bringing suits otherwise allowed against military contractors, and civilians should not be allowed to bring suits otherwise barred by the military contractor defense. Instead, the policy considerations were those behind the immunity conferred upon the government and its employees under the Federal Tort Claims Act, 28 U.S.C. section 1346(b), for the exercise of a discretionary function, in this case the selection of the design of military equipment. *Id.* at 456-457.

With the foregoing qualifications, the Court adopted the defense as formulated under *McKay, supra:*

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Indeed, in *McGonigal v. Gearhart Industries, Inc.* (5th Cir. 1988) 851 F.2d 774, 777, the Court of Appeal noted that

Boyle changed only the ideological basis for the military contractor's defense, and not its substantive elements.

Since the motivating factor behind the military contractor defense is the federal government's interest in the performance of its military procurement contracts and the immunity conferred upon its officers in performance of their authorized duty, see *Boyle, supra,* 487 U.S. at 504-507, the preconditions for the application of the *McKay* factors are that the defendant claiming it have a contract with the federal government for the supplying of military equipment. Moreover, by its citation to *Miree* and its discussion following, the Court made clear that the defense applies only when there is a conflict between the contractor's duty under state law and its duty under the federal contract. *Boyle, supra,* 487 U.S. at 507-509. *Boyle* and its predecessors set forth a "military contractor's defense" and not a "military specifications defense." If a defendant cannot meet these preconditions and then establish each and every element of the defense as set forth in *Boyle*, it is not a defense that the product in question met specifications promulgated by a branch of the military. See *McLaughlin, supra*, 148 Cal.App.3d at 208-209; see also, *Nobriga v. Raybestos-Manhattan, Inc.* (Haw. 1984) 683 P.2d 389, 392. In the present case, defendant failed to meet three crucial prerequisites for the application of this doctrine, and so it was properly precluded from asserting this defense.

A. Defendant did not establish that it had a contract directly with a branch of the military.

As noted above, the first critical item of proof in a military contractor's defense is that the product which injured the plaintiff was manufactured by the defendant pursuant to a procurement contract between the defendant and a branch of the United States armed forces. See *Boyle, supra,* 487 U.S. at 505-507. One of the chief rationales of

Boyle was that the federal government has as much of a uniquely federal interest in a military equipment procurement contract as it does in a performance contract such as the one discussed in *Yearsley v. W. A. Ross Constr. Co., supra,* 309 U.S. 18. *Boyle, supra.* This same rationale was also set forth in *McKay, supra,* 704 F.2d at 748-749, in which the Ninth Circuit also cited *Yearsley.* In *Tillett v. J.I. Case Co., supra,* 756 F.2d 591, 598, the Seventh Circuit followed the *McKay* decision, noting:

> "We furthermore observe that, as a preliminary matter, a defendant asserting the government contract defense must prove that it supplied the product which caused the relevant injury pursuant to a contract with the Government."

Moreover, this rule also applies to the manufacturers of components; in *Wilson v. Boeing Co.* (E.D. Pa. 1987) 655 F.Supp. 766, 769-771, the federal district court upheld the military contractor defense asserted by General Electric precisely because defendant had its own contract to supply aircraft engines to the military according to precise design specification that encompassed the specific defect urged by plaintiffs. Thus, in order to assert this defense, a defendant as a starting point must product a contract between itself and a military branch of the United States government for the supply of ablative tape and other products.

Defendant failed to meet this first critical issue. Defendant never produced either a witness or a document to establish that it had a military contract itself. Indeed, defendant did not even deal directly with a government contractor; it established only that it had contracts with Kaiser Aerospace which had contracts with other private manufacturers which eventually down the line had contracts with the government. [See RT 1480 to 1481.] Without this

crucial first step, none of the policies enunciated by the Supreme Court in *Boyle* apply.

B. Defendant failed to show that it sold military equipment.

The second critical precondition to the military contractor's defense is that the product in question is "military equipment." Just as the military contractor's defense does not apply without a military contract, a product is not "military equipment" unless it is designed and produced specifically for the military; standard products which are also sold commercially to others do not come within this definition. See *Boyle, supra,* 487 U.S. at 509-510, in which the Supreme Court that this defense does not apply to the purchase of stock items, and *McKay, supra,* 704 F.2d at 451, in which the Ninth Circuit noted that ordinary consumer products purchased by the armed forces are not military equipment. This point was further highlighted in *Dorse v. Armstrong World Industries* (Fla. 1987) 513 So.2d 1265 in which the state court answered a question certified by the federal court as follows:

> "Moreover, the defense is inappropriate where the contract in question is to supply services or goods of a commercial, nonmilitary nature. While the question of what goods are 'commercial' is not subject to a bright-line test, we find that goods are commercial and not military in nature when they are the same or substantially similar to goods produced for sale to nonmilitary buyers. If the military is only one outlet in a larger market, the policies of strict liability will continue to require that the enterprise itself must bear the cost of the injuries it produces. It would be absurd to permit one injured party to recover damages because he

> was injured by a product sold in the marketplace while another is denied recompense solely because he was injured by the same or substantially similar product produced for a military purchaser."

While much of the remainder of the *Dorse* opinion relied on the military contractor defense as outlined in *Shaw v. Grumman Aerospace Corp., supra*, 778 F.2d 736, which was rejected in *Boyle*, the above discussion regarding the definition of "military equipment" is precisely in line with the Supreme Court's decision in *Boyle* and the Ninth Circuit opinion in *McKay*. Furthermore, as noted above, this same rule applies to the manufacturers of components. See *Wilson, supra,* 655 F.Supp. at 769-771; see also *In re New York City Asbestos Litigation* (1989) 542 N.Y.S.2d 118 in which the court rejected the military contractor defense as urged by asbestos manufacturers, stating:

> Additional support for rejecting the military contractor defense here derives from the fact that asbestos was not exclusively used in military equipment. Since asbestos was used as insulation material for products other than military hardware, it is not by definition strictly military equipment. [Id. at 121, citing *In re Hawaii Federal Asbestos Cases* (D. Haw. 1988) No. 85-0447.]

Thus, in the present case, it is not enough for defendants to say that a missile is military equipment; they must show that asbestos tape also qualifies.

One point that should be noted is that the existence of military specifications for a product does not per se make that product military equipment. It is a fact of life that the federal government generates detailed specifications for any product which it purchases, including such mundane items

as paper clips, alarm clocks and lead pencils. These products are by no stretch of the imagination military equipment. Likewise, that a product is necessary to the military does not make the product itself military equipment. Soldiers need food, but as the Court of Appeal noted in *McKay, supra*, a can of beans is still not military equipment.

In the present case, the testimony was undisputed that defendant U.S. Polymerics manufactured and sold its asbestos tape to commercial sources long before it was used by Kaiser in its missile cones. [RT 1601 to 1604.] Notwithstanding some dictum in *Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1317-1318 [273 Cal.Rptr. 214] that incidental sales will not necessarily divest a product of its military character, it is clear that a product originally made for commercial purposes which is merely adopted for use by the government is not a military product. See *In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 812 to 813.

C. Defendant did not establish that the design defect is an inherent and required part of the product specifications.

The fundamental principal behind the military contractor defense is the need for federal pre-emption in areas of uniquely federal interest when the requirements of state law conflict with those imposed under a federal contract. *Boyle, supra,* 101 L.Ed.2d at 454-455. Thus, the defense was applied in *Tozer v. LTV Corp., supra,* 792 F.2d 403 and *Dowd v. Textron, Inc., supra* 792 F.2d 409, in which the design defects of which plaintiffs complained were part of the specifications of the product, and correction of the defects could not have been accomplished without making an unauthorized alteration of the approved design. In *Boyle, supra,* 101 L.Ed.2d at 455-456, however, the supreme Court noted that if there is no conflict between the contractor's

duty to comply with military specifications and the state-prescribed duty of care, state products liability law would not be pre-empted. Accordingly, if the specifications do not affect the ability of the manufacturer to incorporate safety devices or warnings into its products, they do not insulate the manufacturer from design product liability for failure to incorporate these safety devices or warnings.

Cases following *Boyle* have noted that although "failure to warn" cases are within the scope of the defense, the requirement of binding specifications precluding other warnings must be met. In *Nicholson v. United Technologies* (D.Conn. 1988) 697 F.Supp. 598, 604, the district court granted summary judgment upon proof that the contents of a manual accompanying military equipment were set by required specifications, stating:

> A contractor should not be held liable for deficiencies in the contents of a maintenance manual if the contents are dictated by the government.

In *New York City Asbestos, supra,* 542 N.Y.S.2d at 120, however, the defense was rejected for several reasons, including the absence of proof that warning labels on products would have conflicted with federal specifications requirements. Similarly, in *Dorse v. Armstrong World Industries, Inc.* (S.D. Fla. 1989) 716 F.Supp. 589, in which the federal district court applied both a question previously certified to the state court and the intervening decision in *Boyle,* the court stated:

> [T]he state-imposed duty of care that is the asserted basis of the contractor's liability (warning of the danger) is not "precisely contrary" to the duty imposed by the government contract (the duty of [sic] manufacture and deliver cement containing asbestos). In fact, the

> evidence suggests that *no* conflict exists between the state tort duty and the federal contractual duty. The defendant's exhibit of Navy Department specifications does not contain any prohibition against health warnings on the product. [Footnote omitted.] Moreover, the deposition of Eagle-Picher's Director of Claims indicates that the defendant could have complied with both its state tort law duty and its Navy contract.

Id. at 591. See also *Jackson v-8. Deft, Inc., supra,* 223 Cal.App.3d 1305 at 1317. Accordingly, defendant in the present case was required to show that federal specifications precluded warnings on its packages.

Although defendant presented some rather strange testimony about unwritten agreements not to put warnings directly on the tape itself [RT 1596], the evidence was undisputed that there was no restriction on placing warning labels on the packages in which the tape came. [RT 1398.] This evidence absolutely precludes defendant's reliance on the military contractor defense. *In re Hawaii Federal Asbestos Cases, supra,* 960 F.2d 806, 812 to 813.

In summary, defendant failed to meet several significant requirements of the military contractor defense including (1) the status of a military contractor; (2) the existence of a military product; and (3) a conflict between state law and a federal contract. The trial court correctly prevented defendant from attempting to put on what amounted to a "military specifications" defense which is clearly insufficient under California law. See *McLaughlin V-8. Sikorsky Aircraft Co., supra,* 148 Cal.App.3d 203, 209.

IV.

DEFENDANT'S CONTENTIONS REGARDING BIFURCATION ARE WITHOUT MERIT

Defendant has made a lengthy argument that the trial court's bifurcation order hindered defendant's ability to present its contributory negligence defense and prejudiced the jury against it. [Appellant's Brief, pp. 39 to 42.] Defendant strenuously argues that notwithstanding Code of Civil Procedure sections 598 and 1048, the bifurcation was "in excess of the trial court's discretion. . . ." Plaintiffs submit that if this bifurcation order was so devastating, defendant's trial counsel should have expressed himself a little more forcefully to the trial court.

At the beginning of the trial the court announced that it would bifurcate the case, have the same jury determine issues of medical causation and the amount of damages first and liability second. Counsel for ICI, a defendant not involved in this appeal, objected to the bifurcation on the sole ground that the case would be cheaper to try if it were not bifurcated. The trial court denied this motion, stating that it had to consider the overall case. [RT 17 to 18.] Counsel for defendant and appellant BP Chemicals then stated:

> MR. FADEFF: Your Honor, Jeffrey Fadeff on behalf of BP Chemicals. I just want to joint (sic) in the objection, for the record.
>
> THE COURT: Very well, likewise denied. [RT 18.]

This perfunctory "me too" objection based solely on litigation costs could in no way put either the trial court or opposing counsel on notice that defendant considered the bifurcation order reversible error.

An order bifurcating issues in a trial is not one of the orders specified in Code of Civil Procedure section 647 to which an exception is deemed made. Accordingly, under section 646 defendant was obligated to make an exception, i.e. "an objection upon a matter of law to a decision . . ." in order to raise the point on appeal. See *Allin v. Internat. Etc. Stage Employees* (1952) 113 Cal.App.2d 135, 136-137 [247 P.2d 857]. The objection must at minimum "point[ ] out clearly the error complained of. . . ." *Allin, supra.* In the present case, the only error asserted by any defendant was that bifurcation would increase the amount of trial time for that defendant. While this is a point which a trial court should (and did) consider in determining whether or not to bifurcate a trial, the decision is still fully within the scope of the trial court's discretion. Defendant has waived the points asserted on appeal by failing to raise them below. See 9 Witkin, *California Procedure, supra,* "Appeal" § 311 pp. 321-322.

Code of Civil Procedure section 598 specifically authorizes a trial court to order one issue tried before another "for the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation. . . ." The trial court bifurcated medical causation and damages from the other issues because there were substantial contentions by defendants that cigarette smoking was the sole cause of the lung cancers suffered by Marvard Casey and Robert Gaylord. [RT 17.] Obviously, a determination that a plaintiff's lung cancer was caused by smoking and not by asbestos would obviate the need for any evidence on liability. Additionally, a determination of both medical causation and the amount of damages frequently gives parties a better idea of the settlement value of a case; this point was amply demonstrated in the present case.

The cases cited by defendant in making its assertions of error and prejudice do not offer any support.[5] Defendant cites *Cook v. Superior Court* (1971) 19 Ca.App.3d 832 [97 Cal.Rptr. 189] without noting that it is based on a version of Code of Civil Procedure section 598 which has since been amended to provide that the court may make an order at any time on its own motion that

> *"... the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof, except for special defenses which may be tried first pursuant to Sections 597 and 597.5."*

See West's Ann. Cal. Code Civ. Proc., § 598 [1993 supp.] "Historical and Statutory Notes." Defendant also fails to note that in *United Air Lines, Inc. v. Wiener* (9th Cir. 1961) 286 F.2d 302 the Ninth Circuit reviewed and reversed a trial court order that *separate juries* determine issues of liability and damages. *Id.* at 306. There would be problems with this practice under California law as well. See *Medo v. Superior Court* (1988) 205 Cal.App.3d 64 [251 Cal.Rptr. 924].

In the present case, all of the bifurcated issues were tried in front of the same jury. The trial court's procedures were specifically authorized by section 598, as well as by the policies underlying Section 19 of the Standards for the Administration of Justice. Defendant's belated protestations of unfairness should be rejected as untimely and unmeritorious.

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[5] *Kinnel v. Mid-Atlantic Mausoleurns, Inc.* (3rd Cir. 1988) 850 F.2d 958 involved a situation in which a jury in the liability phase was not asked about the liability of one of two defendants, but in the damages phase made an award against both defendants. *Jackson Water Works, Inc. v. PUC* (9th Cir. 1986) 793 F.2d 1090 has no discernable relevance to this case.

V.

THE TRIAL COURT ERRED IN DENYING PLAINTIFFS THEIR COSTS AND INTEREST UNDER CODE OF CIVIL PROCEDURE SECTION 998

In May of 1991 plaintiffs' counsel served a statutory offer to compromise on three defendants, including defendant BP Chemicals (Hitco), Inc. [J.A.] The offer was worded as follows:

TO ALL DEFENDANTS AND TO THEIR ATTORNEYS OF RECORD:

> Plaintiffs ROBERT GAYLORD and JANET GAYLORD hereby offer to have judgment taken against the defendants listed on Exhibit A, which is attached hereto and incorporated by reference herein, for the sums indicated pursuant to C.C.P. Section 998. This offer is made to each defendant in the sum specified for its several liability only, and the payment of said sum shall release the personal injury and loss of consortium claims against said defendants.
>
> Plaintiffs ROBERT GAYLORD and JANET GAYLORD hereby offer to compromise with each defendant listed on Exhibit A, for the amount indicated, in compromise of its several liability only, and not for a discharge of any other defendant's liability, and not for a discharge of any other defendant's liability, and not for a discharge of any other claim. Acceptance of this offer by any defendant constitutes agreement by the accepting party and the plaintiffs that the sum paid shall afford only a deduction from any other defendant's liability and not a

> discharge of such defendants. Acceptance of this offer by any defendant specifically shall constitute agreement that the plaintiffs may continue to proceed against other non-settling tortfeasors, whether currently parties to this action or not, including but not limited to tortfeasors currently involved in proceedings pursuant to either 11 U.S.C. Chapter 7 or 11 U.S.C. Chapter 11.
>
> PLEASE TAKE NOTICE that if any defendant does not accept the offer in the amount indicated within thirty (30) days of receipt or the time of trial, whichever is sooner, and plaintiffs recover a more favorable judgment, plaintiffs will seek prejudgment interest, costs and expert witness fees as provided in C.C.P. Section 998 and Civil Code section 3291. This offer is deemed withdrawn if not accepted within thirty (30) days or at the time of trial, whichever date is sooner, or before revoked by plaintiffs. [J.A.]

Exhibit A to the offer merely listed the defendants as follows:

Defendant	Amount of Offer to Compromise
B.P. CHEMICALS (HITCO), INC.	$49,999.00
DEXTER	$49,999.00
ICI COMPOSITES, INC.	$49,999.00

Defendant BP Chemicals did not accept the statutory offer.

The verdict in this case came to $1,304,000.00 for Robert Gaylord and $200,000.00 for Janet Gaylord. [J.A.] After adjustment for settlement and the application of Civil Code section 1431.2, the net judgment for Robert Gaylord

was $931,159.00 and the net judgment for Janet Gaylord was for $50,000.00. [J.A.]

Following the verdict on the second phase of the trial, plaintiffs moved for pre-judgment interest and expert witness fees pursuant to the terms of section 998. [J.A.] Defendant opposed the motion on the ground that the wording of the offer for compromise of defendant's "several" liability only was an offer to compromise only non-economic damages and not economic damages. [J.A.] The trial court denied plaintiff's motion, ruling as follows:

> After reviewing the moving papers, the opposition, the arguments of counsel, the court ruled that the plaintiff was not entitled to costs pursuant to C.C.P. § 998 because the § 998 demand was improperly worded and did not contain individual demands for each plaintiff. [J.A.]

The apparent basis of the trial court's ruling is that the offer was made by both Robert and Janet Gaylord for both the personal injury and loss of consortium claims, rather than having separate offers by each plaintiff. Plaintiffs have appealed this ruling. [J.A.]

The trial court was obviously in error in determining that the plaintiffs' offer was insufficient did not contain individual demands for each plaintiff. The purpose of the rule requiring offers to and from individual plaintiffs is to insure that after the verdict it will be possible to determine which parties, if any, obtained an award more favorable than the offer. See *Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 263 [259 Cal.Rptr. 311]. When two or more plaintiffs make a joint offer which defendant rejects, and one of the plaintiffs alone receives a verdict which exceeds the total amount of the offer, it is obviously possible to determine that this plaintiff's recovery exceeded the offer. Under similar circumstances, both the First District, see

Winston Square Homeowners' Assn v. Centex West, Inc. (1989) 213 Cal.App.3d 282 [261 Cal.Rptr. 605] and the Second District, see *Fortman, supra; cf. Stallman v. Bell* (1991) 235 Cal.App.3d 740 [286 Cal.Rptr. 755] have held that a plaintiff may recover the extra costs allowed under section 998 when the amount of the recovery by that plaintiff exceeds the total amount of a joint offer.

That the offer to settle was made jointly by both plaintiffs did not impose any form of burden on defendant. Robert Gaylord's personal injury claim was obviously the much more important claim. Defendant in this case did not face the problem faced by the plaintiffs in *Randles v. Lowry* (1970) 4 Cal.App.3d 68 [84 Cal.Rptr. 321] and *Hutchins v. Waters* (1975) 51 Cal.App.3d 69 [123 Cal.Rptr. 819] or the defendants in *Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579 [11 Cal.Rptr. 2d 820] of obtaining the consent of other parties or of being forced to settle with several parties, some of whom might not prevail at trial. The offer was made separately to each defendant, and there was no defense to Janet's derivative claim which would not also have been a defense against Robert's claim.

Finally, In the present case, there is no way in which this settlement offer could be divided that the claim of one of the plaintiffs would have exceeded the offer. If the claims are taken together or separately, each exceeded the offer. Moreover, if defendant experienced confusion with the use of the word "several liability,"[6] it should be noted that Janet

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[6] Defendant made the argument below that it was confused because plaintiff's counsel used the term "several liability" in the offer. [J.A. .] The context of the offer makes clear that plaintiffs were not intending to settle only non-economic damages, but rather were intending to extend offers to each defendant separately so as to avoid the problem of *Taing v. Johnson Scaffolding Co., supra,* 9 Cal.App.4th 579 in which offers were made jointly to several defendants. It makes very little sense for either plaintiff or defendant to settle a defendant's liability

Gaylord's claim, which was entirely non-economic damages, exceeded the offer both before and after reduction for settlements and section 1431.2 adjustments. Accordingly, the trial court erred in failing to adjust the judgment to include pre-judgment interest and expert witness fees as set forth in section 998.

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for non-economic damages and not settle the liability for economic damages. Obviously, if defendant had been in any doubt on this point, a telephone call would have cleared up the matter.

VI. CONCLUSION

The jury in this case properly held defendant BP Chemicals (Hitco), Inc. liable for the asbestos-related lung cancer which Robert Gaylord contracted. The results of that verdict should be affirmed on appeal. The trial court, however, failed to award plaintiffs the augmented costs allowable under Code of Civil Procedure section 998. Plaintiffs respectfully submit that the judgment should be affirmed except for a limited remand solely for the purpose of determining the amount which should be added to the judgment for pre-judgment interest and expert witness fees.

DATED: August 30, 1993

Respectfully submitted,

BRAYTON, GISVOLD & HARLEY

and

LAW OFFICES OF BRYCE C. ANDERSON

By /s/ BRYCE C. ANDERSON
Bryce C. Anderson
Attorneys for Plaintiffs, Respondents and Cross-Appellants

PROOF OF SERVICE BY MAIL — CCP 1013A, 2015.5

I declare that I am a resident of, and employed in the County of Contra Costa, State of California. I am over the age of eighteen years, and not a party of the within entitled cause. My business address is 2321 Stanwell Drive, Concord, CA 94520. On August 30, 1993, I served the within **BRIEF OF RESPONDENTS AND CROSS-APPELLANTS** on the interested parties in said cause by placing a true and correct copy thereof in a sealed envelope, postage prepaid, in the United States mail at Concord, California, addressed as follows:

Tom K. Hammitt, Esq.
KENNEY, BURD, KNUTSON & MARKOWITZ
4 Embarcadero Center
Suite 2500
San Francisco, CA 94111

Phillip A. Harley, Esq.
BRAYTON, GISVOLD & HARLEY
999 Grant Avenue
P.O. Box 2109
Novato, CA 94948

Clerk, Superior Court
City Hall
400 Van Ness Avenue
Room 317
San Francisco, CA 94102

Clerk, Supreme Court
State of California
Marathon Plaza, South Tower
303 Second Street, 8th Floor
San Francisco, CA 94107
(5 copies)

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed August 30, 1993, at Concord, California.

/s/ ANNA M. ZANDONELLA

Anna M. Zandonella

APPENDIX 19

STEPHEN C. KENNEY, ESQ. State Bar No: 053883
JEFFERY J. FADEFF, ESQ. State Bar No: 111497
TOM K. HAMMITT, ESQ. State Bar No: 145852
KENNEY, BURD, KNUTSON & MARKOWITZ
4 Embarcadero Center, Suite 2500
San Francisco, California 94111
Telephone: (415) 397-3100

Attorneys for Respondent and Cross-Appellant
BP CHEMICALS (HITCO) INC.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT — DIVISION FOUR

ROBERT and JANET GAYLORD,

Plaintiffs, Respondents, Cross-Appellants,

v.

BP CHEMICALS (HITCO) INC.

Defendants, Appellant, Cross-Respondent.

Action No: AO 59183

San Francisco Superior Court
Action No: 891562

BP CHEMICALS (HITCO) INC.'S REPLY TO GAYLORDS' OPPOSITION BRIEF AND OPPOSITION TO GAYLORDS' OPENING BRIEF IN CROSS-APPEAL

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Appellant and cross-respondent BP Chemicals (HITCO) Inc. ("BP Chemicals") hereby submits its reply to respondents Robert and Janet Gaylord's ("the Gaylords") opposition brief and its opposition to the Gaylords' opening brief in their cross-appeal.

I

INTRODUCTION

This action is based on the Gaylords' claim that Mr. Gaylord contracted cancer as the result of the combination of his 34 years of cigarette smoking with his exposure to asbestos while working at kaiser Aerospace. The Gaylords do not contend that either asbestos or cigarette smoke, alone, caused Mr. Gaylord's cancer, but that the two exposures, together, created a "synergistic effect" that drastically increased his risk of cancer to a level many times greater than the sum of the risks created by these exposures independently.[1] (A.B., pp. 8-9, *citing*, R.T., 524:10-12; 549:3-6; 551:24-552:14). The Gaylords acknowledge that the jury's verdict was necessarily based on the finding that Mr. Gaylord's cancer was caused by this synergistic effect, and not by smoking or asbestos exposure alone. (Respondents/Cross-Appellants' Opening Brief ("R.B."), pp. 6-7, 9, 12). This conclusion also conforms with the consistent testimony of all of the Gaylords' medical experts, who agreed that the synergistic effect of smoking and asbestos,

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[1]The synergistic carcinogenic effect of smoking and asbestos exposure has been the adjudicated cause of lung cancer in several published case decisions. *See, e.g.: Borman v. Raymark Industries, Inc.* (3d Cir. 1992) 960 F.2d 327, 330; *Rogers v. Raymark Industries, Inc.* (9th Cir. 1991) 922 F.2d 1426, 1428; *Ingram v. ACANDS, Inc.* (9th Cir. 1992) 977 F.2d 1332, 1342; *Altiere v. Fibreboard Corp.* (Pa. 1992) 617 A.2d 1302, 1304-05; *Larson v. Johns-Manville Sales Corp.* (Mich. 1986) 399 N.W.2d 1, 4.

not asbestos alone, caused Mr. Gaylord's cancer. *Id.*, p. 8 (*citing,* R.T., 296:26-297:6; 511:13-512:22; 617:1-13).

BP Chemicals is the successor to U.S. Polymeric, which contracted to supply Kaiser Aerospace ("Kaiser") with resin-impregnated asbestos tapewrap used to manufacture the Polaris A3 and Poseidon missiles. (Appellant's Opening Brief ("A.B."), pp. 3-5, *citing*, R.T., 1580:3-6). Kaiser's contracts with the government required that these products be used in constructing ablative liners for the second-stage rocket motor nozzles of these missiles. (A.B., pp. 3-5, 26-28; R.T., 1485:24-1486:4). The government mandated the use of these products, which were designated as FM 5075 and FM 5076, because their ablative qualities served to protect the nozzles from being damaged by the hot gasses associated with thrust production. (A.B., p. 4, *citing*, R.T., 1606:3-24).

U.S. Polymeric provided Kaiser with some 35 shipments of these products, ending in 1975. (R.T., 1413:5-6; 1608:22-1609:12; *see,* R.B., p. 13). Beginning in 1972, U.S. Polymeric printed warnings on the boxes in which FM 5075 and FM 5076 were shipped. (A.B., p. 5, *citing*, R.T., 1591:1-28; 1614:24-1615:1). However, neither Kaiser management nor any Kaiser employees handling the boxes passed on any of these warnings to others. (A.B., p. 35, *citing*, R.T., 1297:16-19). After 1972, U.S. Polymeric also stopped supplying asbestos-containing products to the military aerospace industry, except as required under previously existing contracts where no substitute products were allowed by the government. (A.B., p. 5, *citing*, R.T., 1591:1-1594:23).

II

SUMMARY OF ARGUMENT

BP Chemicals' principal arguments on appeal can be divided into two categories: the lack of evidence to support

the jury's verdicts that U.S. Polymeric's tapewrap was a significant contributor or Mr. Gaylord's cancer (A.B., pp. 12-15), or that U.S. Polymeric breached a duty to warn Mr. Gaylord (A.B., pp. 30-37); and the applicability of the government contractor defense to the Gaylords' claim that U.S. Polymeric's tapewrap was defectively designed. (A.B., pp. 15-30). BP Chemicals also contends that Mr. Gaylord's economic damages award was excessive, and that the "reverse bifurcation" of the liability and damages trials resulted in prejudice and a denial of due process. (A.B., pp. 37-42).

As discussed herein, the arguments and evidence presented in the Gaylords' opposition brief fail to undermine any of BP Chemicals' principal contentions. While the Gaylords contend that Mr. Gaylord's asbestos exposure contributed to his cancer risk (R.B., p. 5-8, 12-13), they do *not* identify any evidence to support their claim that he was significantly exposed to any of U.S. Polymeric's asbestos-containing products. Instead, the Gaylords base their opposition entirely upon evidence of Mr. Gaylord's exposure to asbestos-containing materials used in the nosecones of Advanced Minuteman missiles, in which none of U.S. Polymeric's products, let alone U.S. Polymeric's asbestos-containing products, were used. (R.B., pp. 8). Mr. Gaylord's lack of significant exposure to U.S. Polymeric's asbestos-containing products, standing alone, fully merits reversing the judgment in this case or, at least, remanding this matter for a new trial.

An alternative basis for a reversal or remand of this matter lies in the defects underlying the verdicts on the Gaylords' failure-to-warn and design defect claims.

With respect to their failure-to-warn claim, the Gaylords freely admit that the hazard that the jury found caused Mr. Gaylord's cancer was the synergistic effect of cigarette smoke and asbestos exposure, not smoking or asbestos alone. (R.B., p. 12). However, the Gaylords do not

contest the undisputed fact that this cancer risk was entirely unknown during the time that U.S. Polymeric supplied asbestos-containing tapewrap to Kaiser. Instead, the Gaylords erroneously contend that the verdict can be affirmed on the basis that U.S. Polymeric allegedly failed to provide general asbestos health warnings — warnings that would *not* have mentioned the unknown synergistic effect of asbestos and smoking — with the packaging in which its asbestos-containing tapewrap was delivered. (R.B., pp. 15-16).

With respect to the design-defect claim, the Gaylords argue that the trial court ruled correctly in striking the government contractor defense, although, as discussed in the opening brief and herein, the elements of the defense were supported by uncontested evidence. (*See*, A.B., pp. 15-32). At the very least, the trial court should have submitted this defense to the jury. Considered together, these defects require that the judgment against BP Chemicals be reversed, or that this matter be remanded for a new trial.

The Gaylords have cross-appealed against BP Chemicals, alleging that the trial court erred in refusing to award their costs and interest pursuant to Code of Civil Procedure section 998. As discussed herein, however, the trial court properly held that the Gaylords' section 998 offer was invalid, because it only extended to the Gaylord's claim for noneconomic, or "several" damages, and not to their entire action against BP Chemicals. On appeal, this Court should not condone the Gaylord's attempt to split their claims in this unauthorized manner.

III

ARGUMENT

A. THERE WAS NO SUBSTANTIAL EVIDENCE THAT MR. GAYLORD WAS INJURED BY U.S. POLYMERIC'S ASBESTOS-CONTAINING PRODUCTS

BP Chemicals contends that the jury's finding that U.S. Polymeric's asbestos-containing tapewrap contributed to Mr. Gaylord's cancer is not supported by any substantial evidence. In support, BP Chemicals relies on the overwhelming evidence introduced at trial that Mr. Gaylord's cancer, like some 90 percent of all lung cancers, was caused by cigarette smoking alone, and the lack of any substantial evidence identifying U.S. Polymeric's FM 5075 and FM 5076 tapewrap as products to which Mr. Gaylord was significantly exposed. (A.B., pp. 12-15).

A. There Was No Substantial Factual Evidence That Asbestos Was a Cause of Mr. Gaylord's Cancer

The *only* medical evidence that the Gaylords identify to show that asbestos exposure may have increased Mr. Gaylord's cancer risk was discussed in the testimony of Dr. Samuel Hammar, one of the Gaylords' trial experts, who personally examined lung tissue samples removed from Mr. Gaylord during his second biopsy.[2] As the Gaylords note, Dr. Hammar testified that a cancer could only be identified as asbestos-related if a competent pulmonologist determined that a patient had suffered *asbestos-related*

[2] Another of the Gaylords' experts, Dr. Barry Horn, also discussed the biopsy. (R.B., p. 12). Dr. Horn, however, did not analyze the tissue samples, and based his testimony solely on Dr. Hammar's observations. (RT, 297:12-18).

fibrosis in his lungs. (R.B., p. 7). Dr. Hammar, however, testified that he could not determine whether Mr. Gaylord's cancer was asbestos-related, because the fibrosis he observed could just as easily have been caused by Mr. Gaylord's radiation therapy as by asbestos. (R.T., 626:307, 692:27-697:6).

Dr. Hammar's testimony on this critical issue was corroborated by Dr. Horn, who testified that pathological evidence of asbestos-related lung scarring was "the gold standard" for determining whether a patient's cancer was related to asbestos exposure. (R.T., 270:8-9). This testimony was also corroborated by BP Chemicals' medical experts Dr. Colleen Bergin and Dr. Robert Morgan, both of whom testified that a pathological finding of asbestos-related fibrosis was necessary to determine that asbestos contributed to the patient's lung cancer. (R.T., 883:26-884:5 (testimony of Dr. Bergin); 960:18-26 (testimony of Dr. Morgan).) As discussed in the opening brief, however, it is undisputed that Mr. Gaylord was never diagnosed as having clinical asbestosis. (A.B., pp. 9-10, *see*, R.T., 975:14-15). Moreover, no asbestos bodies were found in the two-thirds of Mr. Gaylord's right lung that was removed in 1990. (R.T., 975:16-28).

Perhaps recognizing the weakness of their position, the Gaylords contend that BP Chemicals' opening brief failed to review any of the evidence that could have supported the jury's finding that asbestos contributed to Mr. Gaylord's cancer and on this basis, suggest that this Court should disregard BP Chemicals' argument entirely.[3] (R.B., p. 10).

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[3] The Gaylords contend that this Court should exclude *all* of BP Chemicals' arguments based on insufficiency of the evidence on this basis. As discussed herein, the *only* evidence supporting the verdict that they accurately identify goes to the issue of whether Mr. Gaylord's asbestos exposure was a cause of his cancer. The Gaylords do not cite any "omitted" evidence with respect to BP Chemicals' arguments

The only evidence cited by the Gaylords that was omitted from BP Chemicals' opening brief, however, was Dr. Hammar's general comment that, if Mr. Gaylord's asbestos exposure was similar to that of an asbestos insulation worker, his exposure could possibly have been sufficient to cause lung cancer. (R.T., 630:4-18, *cited at* R.B., p. 7). Almost in the same breath, however, Dr. Hammar also testified that Mr. Gaylord's cigarette smoking, of itself, was also sufficient to have caused his cancer. (R.T., p. 630:20-22). The Gaylords also claim that BP Chemicals failed to identify evidence that Mr. Gaylord consumed one-half pack of cigarettes daily, even though that evidence was cited in the opening brief. (A.B., p. 5, *citing*, R.T., 288:5-21).

The Gaylords rely on *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 92 Cal.Rptr. 162, and *Wickham v. Southland Corp.* (1983) 168 Cal.App.3d 49, 213 Cal.Rptr. 825, in support of their argument that BP Chemicals waived its right to a review of the sufficiency of the evidence. In both of those cases, however, the courts decided the insufficiency-of-evidence arguments on their merits, even though the circumstances involved were far more egregious than are even arguably present here. *Foreman, supra,* 3 Cal.3d at 883; *Wickham, supra,* 168 Cal.App.3d at 57. The Gaylords' argument that BP Chemicals waived any issues on appeal, therefore, should be rejected.

2. There Was No Substantial Evidence That Mr. Gaylord Was Significantly Exposed to U.S. Polymeric's Asbestos-Containing Products

To establish that Mr. Gaylord was significantly exposed to any of the FM 5075 or FM 5076 tapewrap that

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against the jury's finding that Mr. Gaylord was significantly exposed to any of U.S. Polymeric's asbestos-containing products. Even if meritorious, therefore, the Gaylords' argument, should be confined to the asbestos-causation issue alone.

U.S. Polymeric supplied to Kaiser, the only evidence presented by the Gaylords is the fact that U.S. Polymeric supplied Kaiser with FM 5075 and FM 5076 tapewrap during some of the years of Mr. Gaylord's employment. (R.B., p. 13). The Gaylords do not offer any evidence that Mr. Gaylord was significantly exposed to these products, even though a great deal of evidence was introduced at trial identifying both the missile programs on which Mr. Gaylord worked and the programs on which U.S. Polymeric's products were used. Under these circumstances, the mere fact that U.S. Polymeric, along with a great many other suppliers, supplied some of the asbestos-containing products present at Kaiser is clearly insufficient to support the jury's verdict.

Significantly, the evidence the Gaylords rely on to establish Mr. Gaylord's asbestos exposure consists entirely of evidence of exposure to asbestos-containing products supplied by manufacturers other than U.S. Polymeric. The *only* source of Mr. Gaylord's asbestos exposure that the Gaylords identify in their brief is Mr. Gaylord's work on the nosecones of the Advanced Minuteman missiles manufactured by Kaiser. (R.B. 3,8). BP Chemicals does not dispute Mr. Gaylord's testimony that he machined some 90 percent of the "thousands and thousands" of these nosecones that were produced at Kaiser, or that asbestos-containing tapewrap was used in fabricating these nosecones. (A.B., pp. 6-7, *citing*, R.T., 369:25-28, 1295:5-8; R.B., pp. 3, 6, 8). However, the Gaylords do not even attempt to controvert the undisputed evidence that the asbestos tapewrap in these nosecones were supplied by Raybestos-Manhattan, not U.S. Polymeric. (A.B., pp. 6-7, *citing,* R.T., 1584:1-1585:21). Furthermore, the asbestos contained in Raybestos-Manhattan's products was crocidolite, the specific form of asbestos that the Gaylords contended contributed to Mr. Gaylord's cancer, not chrysotile, the type of asbestos contained in FM 5075 and FM 5076. (A.B., pp. 7, 14; R.T., 193:7-9, 201:26-

202:26). The Gaylords simply have not contended that Mr. Gaylord suffered any significant exposure to the type of asbestos contained in the tapewrap that U.S. Polymeric supplied to Kaiser.[4]

The Gaylords also state that U.S. Polymeric supplied ablative materials for the Trident, Advanced Minuteman, SRAM, and SRM-I and SRM-II programs, although they do not state why these facts should be considered significant. As discussed in BP Chemicals' opening brief, the products U.S. Polymeric supplied for these programs did not contain asbestos, but, instead, contained carbon fiber (FM 5063), fiberglass (FM 5042) or silica (FM 5020). (A.B., pp. 4-5, *citing*, R.T., 1582:18-1583:28). The only product that U.S. Polymeric supplied for the Minuteman and Advanced Minuteman programs was FM 5014, which contained graphite, not asbestos. (R.T., 1567:2-6, 1580:19-1581:1; 1610:7-8). FM 5014, moreover, was only used in the rocket motors of the Minuteman and Advanced Minuteman missiles, and not in the nosecones on which Mr. Gaylord worked. (R.T., 1581:10-18, 1582:28-1583:1). These products, which did not contain asbestos, accounted for practically 99 percent of U.S. Polymeric's sales to Kaiser. (R.T., 1609:9-24). Despite a valiant effort, therefore, the Gaylords have simply failed to identify any substantial evidence that Mr. Gaylord was exposed in any significant degree to asbestos-containing products supplied by U.S. Polymeric.

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[4]As noted in BP Chemicals' opening brief, U.S. Polymeric only supplied Kaiser with asbestos-containing materials for the Poseidon and Polaris programs. (A.B. p. 4). Mr. Gaylord did not work on the Polaris program at all, although there is a possibility that he may have worked on a few of the subassemblies for the Poseidon. (A.B., p. 7). Mr. Gaylord, however, could not recall at trial whether he did any work on the Poseidon second-stage rocket motor nozzle, which was the only part of that program in which U.S. Polymeric's asbestos-containing tapewrap was employed, nor do the Gaylords contend that this was a significant source of his asbestos exposure.

B. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S VERDICT ON THE GAYLORDS' FAILURE-TO-WARN CLAIMS

BP Chemicals also contends there was a lack of substantial evidence to support the verdict on the Gaylords' failure to warn claims. (A.B., pp. 30-37). As the Gaylords have failed to identify any such evidence in their opposition brief, this Court should reverse the judgment on these claims.

Although they concede that the synergistic carcinogenic effect of cigarette smoke and asbestos that they contend caused Mr. Gaylord's cancer was unknown until after U.S. Polymeric stopped supplying asbestos-containing products to Kaiser, the Gaylords contend that the failure-to-warn verdict can be affirmed based on U.S. Polymeric's alleged failure to warn Mr. Gaylord of the general health hazards associated with exposure to asbestos alone. The Gaylords also contend that the testimony of Mr. Bill Vida[5] supports their position that Mr. Gaylord would have received any asbestos warnings that U.S. Polymeric could have printed on the boxes in which its tapewrap was shipped. Both of the Gaylords' arguments, however, are seriously flawed.

1. U.S. Polymeric Did Not Breach Any Pertinent Duty to Warn Mr. Gaylord

As discussed above, the parties agree that the Gaylords' theory of causation at trial, and the jury's verdict, were based on the finding that Mr. Gaylord's cancer was caused by the "synergistic effect" of cigarette smoke and asbestos, which multiplies a person's cancer risk many times over the

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[5] Mr. Vida worked in the production control department at Kaiser during the period of Mr. Gaylord's employment, and was not responsible for ordering materials from suppliers, including U.S. Polymeric.

sum of the risks created by either exposure alone. In defending the jury's verdict on their failure-to-warn claim, however, the Gaylords have apparently abandoned this theory. Instead, the Gaylords contend that the failure-to-warn verdict should be affirmed based on U.S. Polymeric's failure to provide warning of the general health hazards associated with exposure to asbestos alone.[6]

The Gaylords' argument frames the dispositive issue as follows: would a general warning of asbestos health hazards be legally adequate as a warning of the synergistic carcinogenic effect of asbestos and cigarette smoke? As discussed below, such a warning would be inadequate as a matter of law. Therefore, whether U.S. Polymeric provided such warnings, as it undisputedly did from 1972 onward, is immaterial to the disposition of these claims.

A warning is legally adequate only if it adequately warns of the "particular" risk causing a plaintiff's injury. *Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc.* (1990) 221 Cal.App.3d 1601, 1622, 271 Cal.Rptr. 596 (*emphasis supplied*), *citing, Brown v. Superior Court* (1988) 44 Cal.3d 1049, 1065-66, 245 Cal.Rptr. 412. As demonstrated by the case law discussed in the opening brief, the synergistic interaction of two different substances is legally distinct as a cause of injury from the causes normally associated with either substance alone. (A.B. pp. 32-34, *citing*: *Skill v. Martinez* (D.N.J. 1981) 91 F.R.D. 498; *Barry v. Don Hall Laboratories* (Ore. App. 1982) 642 P.2d 685). In *Skill v. Martinez*, for example, the court expressly held that an oral contraceptive manufacturer's legally adequate warnings of the risk of stroke associated with use of its

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[6] It is possible that the Gaylords' change in position results from their recognition that the synergistic carcinogenic effect of cigarette smoke and asbestos exposure was not known until at least two years after U.S. Polymeric stopped supplying asbestos-containing tapewrap. (A.B., pp. 8, 32-33).

products were inadequate, as a matter of law, to warn of the increased risk of stroke caused by smoking combined with oral contraceptive use. 91 F.R.D. at 513-14.

As in the foregoing cases, the "crux of this case," *Skill v. Martinez, supra*, 91 F.R.D. at 513, concerns the elevated risk of cancer caused by asbestos exposure *and smoking*, not asbestos exposure alone. Because the jury found that Mr. Gaylord's cancer was caused by the synergistic effect of asbestos and smoking, a warning of the general health risks of asbestos exposure would have been inadequate as a matter of law to have warned Mr. Gaylord of the increased cancer risk caused by smoking in combination with asbestos exposure. In cases such as this, the "basic question" is whether sufficient knowledge existed at time the product was sold to require the manufacturer to warn of the synergistic effect. (A.B., p. 33; *Skill v. Martinez, supra,* 91 F.R.D. at 514). Whether U.S. Polymeric provided general asbestos health warnings, as it did from 1972 onward, therefore, is immaterial to the disposition of the Gaylords' claims.

BP Chemicals cannot possibly held liable for U.S. Polymeric's alleged failure to provide warnings that, if given, would have been inadequate as a matter of law. Because the synergistic carcinogenic effect of cigarette smoke and asbestos was unknown until after U.S. Polymeric stopped providing FM 5075 and FM 5076 to Kaiser, BP Chemicals cannot be held to have breached any pertinent duty to warn in this case.

2. There Was No Substantial Evidence That Mr. Gaylord Would Have Received Any Warnings U.S. Polymeric Could Have Given

The Gaylords do not contest the absence of any actual evidence that Mr. Gaylord would have received any warnings that U.S. Polymeric could have given. Instead, the Gaylords contend that there were "inferences" from some of

the evidence, specifically, the testimony of Bill Vida, "that a strong warning appearing on the packages of the asbestos tape would have come to his attention and, through him, to the other workers." (R.B., p. 15). Mr. Vida testified very clearly, however, that, even though he knew that Kaiser's engineers considered the air in the lathing area where Mr. Gaylord worked to be so unhealthful that they avoided going there (R.T., 1405:5-1406:1), he did not mention the hazard to the lathe machinists or anybody else until years later. (R.T., 1409:19-23). Mr. Vida's express testimony, therefore, conclusively negates any such "inferences."

Moreover, even though U.S. Polymeric printed asbestos warnings on the boxes in which FM 5075 and FM 5076 were delivered from 1972 onward — a fact the Gaylords do not dispute — there was no evidence whatever to indicate that Mr. Vida or anyone else passed on these warnings. Instead, there was a great deal of consistent evidence that Kaiser systematically prevented its employees from being warned of the hazards of asbestos exposure. (A.B., pp. 35-36, *citing,* R.T., 405:15-406:1, 1297:2-3, 1328:7-8, 1325:9-1326:14).

Based on the evidence, therefore, the "inferences" on which the Gaylords rely are manifestly unreasonable. As discussed in BP Chemicals' opening brief, the *only* reasonable inference from the evidence is that Mr. Gaylord would not have received any warnings U.S. Polymeric could have provided before 1972, just as he did not receive the warnings U.S. Polymeric provided after that date. *Cf., Goodbar v. Whitehead Bros.* (W.D. Va. 1984) 551 F. Supp. 592, *aff'd sub nom Beale v. Hardy* (4th Cir. 1985) 769 F.2d 213 (quoted and discussed at A.B., pp. 36-37). U.S. Polymeric cannot be held liable for failing to provide warnings that would not have reached Mr. Gaylord. *Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 178, 265 Cal.Rptr. 773 (negating duty to warn absent existence of

method for manufacturer to convey warning to injured party); *Rosburg v. Minnesota Min. & Mfg. Co.* (1986) 181 Cal.App.3d 726, 735, 226 Cal.Rptr. 299 (cited at A.B., p. 34).

Although indirectly, the Gaylords have also attempted to challenge the finding at trial that U.S. Polymeric could not have printed any asbestos-related warnings directly on its tapewrap. (*See,* R.B., p. 14 n.3, 28). The Gaylords' counsel, however, conceded at trial that warnings could not have been printed directly on the tapewrap (R.T., 1616:6-10). This argument, moreover, contradicts the undisputed evidence that U.S. Polymeric was prohibited from contaminating or blemishing its tapewrap in any manner whatever, including, for example, by using adhesive tape to secure the tapewrap to the spool around which it was coiled for delivery. (R.T., 1596:1-22). This argument also ignores the fact that any warnings printed on the tapewrap would have been obliterated before Mr. Gaylord could have seen them, as, by that time, the tapewrap would have been wrapped around a mandrel and autoclaved as part of the manufacturing process for the missile parts involved. (R.T., 1612:8-12).

C. THE GOVERNMENT CONTRACTOR DEFENSE BARRED PLAINTIFFS' DESIGN DEFECT CLAIM

The Gaylords present three arguments in defense of the trial court's order striking the government contractor defense. Each argument is seriously flawed, however, and, at best merely reflects the Gaylords' unfamiliarity with several important recent cases construing the government contractor defense.[7]

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[7] This apparent unfamiliarity with recent case law is at least partly explained by the fact that the Gaylords' arguments are duplicated, practically word-for-word, from the opening brief of the appellants in *Jackson v. Deft. Inc.*, 1 Civil No. A046190 (Alameda No. 585 915-5),

First, the Gaylords argue that BP Chemicals lacks standing to assert the government contractor defense. The Gaylords erroneously contend that the government contractor defense only applies to parties in contractual privity with the government, *i.e.*, prime contractors, and not to subcontractors (R.B., pp. 23-24), an improperly narrow view that contradicts the holdings of several recent cases and some of the most important policies underlying the government contractor defense.

Second, the Gaylords argue that the government contractor defense only applies to products that are exclusively "military," and that U.S. Polymeric's tapewrap fails on this basis. (R.B., pp. 24-26). This argument, however, was expressly rejected in *Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1319, 273 Cal.Rptr. 214 and misstates both California law and the laws of many other jurisdictions on this issue.

Third, the Gaylords contend that BP Chemicals failed to show that U.S. Polymeric was "required" to incorporate the alleged design defect — the use of asbestos — in its tapewrap products, which is clearly erroneous in view of the evidence submitted below. (R.B., pp. 26-28).

Consequently, the Gaylords' opposition fails to detract in any way from BP Chemicals' position that the government contractor defense applies to the design defect claims in this matter. As set forth in BP Chemicals' opening brief, every element of the government contractor defense was supported by uncontested evidence. Therefore, this Court should rule that the trial court erred in striking the govern-

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filed with this Court on December 18, 1989 (copy of brief attached hereto as exhibit A; *see*, pp. 22-28). As discussed herein, this Court's published opinion in that case rejected each of the arguments on which the Gaylords rely. BP Chemicals respectfully suggests that these arguments have no greater merit today than they did when they were rejected three years ago.

ment contractor defense, and order that the defense bars the Gaylords' design defect claims as a matter of law, or, in the alternative that the issue should be submitted to the jury at a new trial.

1. The Government Contractor Defense Applies to Subcontractors

The Gaylords' contention that the government contractor defense does not apply to subcontractors flatly contradicts the holdings of the cases cited in BP Chemicals' opening brief. (A.B., p. 17, *citing, Lewis v. Babcock Industries, Inc.* (2d Cir. 1993) 985 F.2d 83, 84-85, and *Ramey v. Martin-Baker Aircraft Co.* (4th Cir. 1989) 874 F.2d 946, 948).

Rather than attempting to distinguish these cases, the Gaylords merely cite *Wilson v. Boeing Co.* (E.D. Pa. 1987) 655 F.Supp. 766, and describe this case as hinging on the finding that "the defendant had its own contract to supply aircraft engines to the military." (R.B., p. 23). That case, however, did not involve a subcontractor, and the court did not even discuss the issue that the Gaylords represent as dispositive. Instead, the dispositive issue in *Wilson* was whether the equipment supplied by the defendant was designed and manufactured according to reasonably precise, government-approved design specifications, not whether the defendant had a contract directly with the government. *Id.* at 770-71. As this Court recognized in rejecting the identical argument in *Jackson v. Deft, Inc.* (*see,* exhibit A, pp. 22-23), *Wilson* does not support the Gaylords' position at all.

Even if the foregoing authorities were not dispositive of this issue, the Gaylords' overly narrow view should be rejected as contrary to the policies the United States Supreme Court held as most important in *Boyle v. United Technologies Corp.* (1986) 487 U.S. 487 (*"Boyle"*). The most important policy underlying the government contractor

defense is avoiding judicial "second guessing" of the government's discretionary functions in procuring the equipment necessary to achieve the government's goals. *Boyle*, 487 U.S. at 511. This concern carries equal weight whether the defendant in a lawsuit is a prime contractor or a subcontractor. In both cases, the contractor is performing a function that the government would either have to perform for itself or delegate to industry. *Id.* at 512. In both cases, the imposition of liability on the contractor would have the same deleterious effect: "either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." *Id.* at 507.

Accordingly, whether or not a defendant in a lawsuit has a contract directly with the government is immaterial to the application of the government contractor defense. The Gaylords' position lacks merit and should be rejected.

2. The Present Lawsuit Involves "Military" Products

The Gaylords contend that the government contractor defense only applies to products that are exclusively "military," and that U.S. Polymeric's tapewrap fails on this basis. (R.B., pp. 24-26). The Gaylords' argument is in error for at least two independent reasons. First, the proper focus of the government contractor defense is upon the product "as a whole" that was procured by the government — in this case, the Poseidon and Polaris A3 missiles, which are indisputably "military" — and not the individual part, component or construction material that a plaintiff claims was defective. (A.B., pp. 20-22). Second, even were this Court to focus its inquiry on U.S. Polymeric's FM 5075 and FM 5076 tapewrap, these products qualify as "military" under the definition this Court adopted in *Jackson v. Deft, Inc.*

a. The Proper Focus for the Government Contractor Defense Inquiry Is on the Product "as a Whole" That Was Procured by the Government

As the long line of cases cited in BP Chemicals' opening brief amply demonstrates, the focus of the government contractor defense is on the product "as a whole" that was procured by the government, not the individual part, component or construction material that a plaintiff claims was defective. (A.B., pp. 20-22, citing cases). In the present case, therefore, the relevant (and rhetorical) question is whether Poseidon and Polaris A3 missiles are "military" products, not whether U.S. Polymeric's asbestos-containing tapewrap, considered independently, so qualifies.

The Gaylords' erroneous suggestion that the Court should focus its inquiry on U.S. Polymeric's tapewrap alone is surprising in view of the discussion in BP Chemicals' opening brief of *Niemann v. McDonnell Douglas Corp.* (S.D. Ill. 1989) 721 F.Supp. 1019 (discussed at A.B., p. 21). As discussed, that wrongful death action involved alleged design defects consisting of the use of asbestos chafing and rub strips on the engine cowlings of certain military aircraft. *Id.*, p. 1021. However, the court rejected the plaintiff's position that the relevant issue was whether the asbestos strips, of themselves, were "military" products, and held that, "under the *Boyle* decision, the use of asbestos [parts] in these particular aircraft falls within the government contractor defense" because "the particular products at issue . . . are the aircraft themselves." *Id.* at 1023-24. *See, also, In re Brooklyn Navy Yard Asbestos Litigation* (2d Cir. 1992) 971 F.2d 831, 839 (holding government contractor defense applicable to design defect claims arising from use of asbestos insulation in Navy ships; cited at A.B., p. 23).

The Gaylords' position on this issue reflects the same error that underlies their argument that subcontractors lack standing to assert the government contractor defense. In

both arguments, the Gaylords simply neglect the most important policy underlying the defense: ensuring that the government's "uniquely federal" interest in procuring products is not hampered by products liability actions applying conflicting state tort law. *Boyle, supra,* 487 U.S. at 506-07. As discussed above, state tort law presents an equally significant conflict with this interest whether the defendant in a lawsuit is a prime contractor or a subcontractor, or manufactured the entire product procured by the government or only supplied the prime contractor with the component, part or construction material that a plaintiff claims was defective. In attempting to render the government contractor defense inapplicable, the Gaylords have neglected its essential purpose. Their erroneous position should be rejected.

b. Even Were The Gaylords' Narrow Focus Under the "Military" Product Inquiry Correct, U.S. Polymeric's Tapewrap was a "Military" Product

Even were the Gaylords correct in focussing their analysis on U.S. Polymeric's asbestos-containing tapewrap, rather than on the missiles "as a whole" procured by the government, the tapewrap readily satisfies the definition of "military" product adopted by this Court in *Jackson v. Deft, Inc.* Therefore, even were the Court to accept the Gaylords' premise that the government contractor defense only applies to "military" products, the Court should reject their erroneous conclusion that "military" products are not involved in this case.[8]

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[8] As discussed herein, FM 5075 and FM 5076 were indisputably "military" products. BP Chemicals notes, however, that the issue of whether a product must be "military" for the government contractor defense to apply has been open to serious question ever since *Boyle*. As this Court has previously noted, *"Boyle* does not distinguish between military and nonmilitary parties." *Vermuelen v. Superior Court, supra,* 204 Cal.App.3d at 1201 (holding evidence of government specifications

As discussed in BP Chemicals' opening brief, a product is "military" for purposes of the government contractor defense if it was "produced according to military specifications and used by the military because of particular qualities which serve a military purpose." *Jackson v. Deft, Inc., supra,* 223 Cal.App.3d at 1319 (*quoted at* A.B., p.23). This definition was implicit under California law even before either *Jackson v. Deft, Inc.* or *Boyle* were decided. For example, in *McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203, 195 Cal.Rptr. 765, the court of appeal held that the manufacturer of a military helicopter was immune from tort liability arising from the allegedly defective design of the flight control system, which used a bolt/nut/cotter-pin assembly to secure certain parts, even though such commonplace hardware could hardly be classified as "military" products when considered abstractly. *Id.* at 207.

The Gaylords do not dispute that U.S. Polymeric's tapewrap was manufactured in accordance with government-approved design specifications, but merely assert that

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relevant in asbestos-related Alameda County Complex Litigation cases). *Vermuelen* is consistent with the laws of numerous other jurisdictions, which do not limit the application of the government contractor defense to military products *See: Carley v. Wheeled Coash* (3rd Cir. 1993) 991 F.2d 1117, 1119 (ambulances); *Boruski v. United States* (7th Cir. 1986) 803 F.2d 1421, 1430 (swine flu vaccine); *Burgess v. Colorado Serum Co.* (11th Cir. 1985) 772 F.2d 844, 846 (same); *Johnson v. Grumman Corp.* (W.D. Wis. 1992) 806 F.Supp. 212, 217 (postal service vehicles); *Price v. Tempo* (E.D. Pa. 1985) 603 F.Supp. 1359, 1361-62 n.3 (fire fighters' gloves); *McDermott v. TENDUN Constructors* (N.J. Super. 1986) 511 A.2d 690, 696, *cert. den.*, 526 A.2d 134 (postal service equipment); *Tillett v. J.I. Case Co.* (7th Cir. 1985) 756 F.2d 591 (front end loaders); *Bynum v. FMC Corp.* (5th Cir. 1985) 770 F.2d 556 (cargo carriers); *Brown v. Caterpillar Tractor Co.* (3rd Cir. 1982) 696 F.2d 246 (tractors); *Casabianca v. Casabianca* (1980) 428 N.Y.S.2d 400 (pizza dough mixer); *Sanner v. Ford Motor Co.* (N.J. Super. 1976) 364 A.2d 43, *aff'd* 381 A.2d 805 (jeeps); *Schmidt v. Cessna Aircraft Co.* (S.D.Ga. 1988) 1988 Westlaw 148422 ("off-the-shelf" aircraft components).

government specifications also exist for "paper clips, alarm clocks and lead pencils." (R.B., p. 25). Whether there are government specifications for these mundane items, however, has no bearing on whether asbestos-containing ablative tapewrap used as an essential material in missile manufacture is a "military" product. *See, In re Brooklyn Navy Yard Asbestos Litigation* (2d Cir. 1992) 971 F.2d 831, 839 (applying government contractor defense to design defect claims arising from use of asbestos insulation in Navy ships); *Dorse v. Armstrong World Industries, Inc.* (Fla. 1987) 512 So.2d 1265 (same); *In re Joint Eastern & Southern District New York Asbestos Litigation* (2d Cir. 1990) 897 F.2d 626 (same); *Niemann v. McDonnell Douglas Corp., supra,* 721 F. Supp. at 1021 (asbestos-containing "rub strips" in military aircraft). The Gaylords neglect the *functional* definition of "military" product employed under California law, and urge this Court to adopt an abstract standard, under which products would be deemed "military" or not without regard to whether the military procured the products because of their perceived military value.

The Gaylords also contend that the government contractor defense only applies to *exclusively* military products (R.B., pp. 24-26), an "extreme position" that this Court has rejected before. *Jackson v. Deft, Inc., supra,* 223 Cal.App. 3d at 1319. The Gaylords' extreme position, moreover, is not even supported by the authorities on which they rely. The Gaylords attempt to draw a bright line between products that are "designed and produced specifically for the military" and "ordinary consumer products" (R.B., p. 24), where no such bright line exists. *Dorse v. Armstrong World Industries* (Fla. 1987) 513 So.2d 1265, 1269. As suggested by the Second Circuit in *Lewis v. Babcock Industries, Inc.*, the government contractor defense applies to stock commercial products, so long as the government evidenced a "significant interest" in their design features, a definition that is entirely consistent with *Jackson v. Deft, Inc. Id.*, 985 F.2d at

87, *citing, Boyle v. United Technologies Corp., supra*, 487 U.S. at 509.

The Gaylords' argument that a can of beans purchased for the armed forces would not be protected as "military" products under the government contractor defense lacks any bearing on this case. (R.B., p. 26). BP Chemicals concedes that beans are not "military" (except for, perhaps, Navy beans), but contends that asbestos-containing tapewrap used in constructing ablative liners inside the rocket motor nozzles of missiles constructed for the national defense is an entirely different matter.

It is undisputed that U.S. Polymeric's tapewrap was qualified for use in the Poseidon and Polaris missiles only after undergoing a thorough military review. Based on this review, the military selected FM 5075 and FM 5076 tapewrap for the Polaris A3 and Poseidon programs because their asbestos content provided the ablative qualities the military required to protect the second stage rocket motors of these missiles from being damaged by the hot gasses associated with thrust production. (A.B., pp. 23-25). The commercial aircraft industry does not use ablative devices, because it does not use rocket power. (A.B., p. 25, *citing*, R.T., 1602:6-13). The purpose for which U.S. Polymeric's tapewrap was selected, therefore, was clearly "military."

The evidence is also undisputed that U.S. Polymeric was required to provide asbestos-containing tapewrap for use in the Polaris A3 and Poseidon programs, and was not allowed to substitute any different materials. (R.T., 1592:1-1594:23). The *only* reason FM 5075 and FM 5076 were present at Kaiser was because the military had selected these asbestos-containing products to satisfy military needs. Accordingly, the U.S. Polymeric tapewrap involved in this case was a "military" product for purposes of the government contractor defense. The fact that a very few, incidental sales of these tapewrap products to the commercial aircraft

industry, presumably for nonablative purposes, might once have occurred makes no difference as to whether the tapewrap to which Mr. Gaylord was allegedly exposed were "military" products under the definition adopted in *Jackson v. Deft., Inc.* In that case, for example, the fact that a full 20 percent of the sales of the polyurethane paint at issue therein were to general industrial accounts did not preclude the application of the government contractor defense.[9] *Jackson v. Deft. Inc., supra,* 223 Cal.App.3d at 1311.

c. The Use of Asbestos in U.S. Polymeric's Tapewrap Was Required by the Government

The Gaylords next argue that BP Chemicals failed in its opening brief to "establish that the design defect [the inclusion of asbestos] is an inherent and required part of the product specifications" for the asbestos-containing tapewrap U.S. Polymeric supplied to Kaiser. Consequently, the Gaylords contend, BP Chemicals cannot establish that a "significant conflict" exists between the government-approved design specifications for U.S. Polymeric's asbestos-containing tapewrap and the requirements of state tort law, as required by the government contractor defense. The Gaylords' argument, however, is clearly erroneous in view of the considerable evidence introduced at trial and summarized in BP Chemicals' opening brief on this issue.[10]

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[9] Inexplicably, the Gaylords belittle this Court's comments on the "incidental commercial sales" issue in *Jackson v. Deft., Inc.,* as merely "some dictum." (R.B., p. 26). As indicated by the published opinion, the sole reason this Court remanded the design defect claims in that case was to receive evidence as to whether the government's selection of the paint at issue was due to its "particular qualities which serve a military purpose." *Jackson v. Deft. Inc., supra,* 223 Cal.App.3d at 1308, 1319.

[10] Curiously, much of respondents' argument is devoted to discussing whether the government-approved specifications for U.S. Polymeric's tapewrap precluded it from printing asbestos warnings on the boxes in

As discussed in BP Chemicals' opening brief, before selecting U.S. Polymeric's asbestos-containing tapewrap for use in the Poseidon and Polaris missile programs, the government conducted a detailed analysis of the tapewrap to ensure that its ablative properties were appropriate for the military's needs. (A.B., pp. 26-27). This process involved consultations with Kaiser, U.S. Polymeric and others, in which potentially suitable existing products were identified and the possibility of developing new materials was discussed. (A.B., p. 27, *citing,* R.T., 1576:7-18). This process also involved rigorous tests; for example, U.S. Polymeric's asbestos-containing products underwent at least 120 rocket motor test firings before the government approved their use in production motors. *Id., citing,* R.T., 1577:10-24.

Furthermore, the government only placed U.S. Polymeric's products on the qualified products list, which was incorporated in the Weapons Specifications for the Polaris A3 and Poseidon missiles, after these tests were completed. (A.B., p. 27, *citing,* R.T., 1576:24-1578:9). Once its products were qualified, U.S. Polymeric was prohibited from deviating from the design specifications, for example, by substituting some other material for asbestos. *Id., citing,* R.T., 1485:20-1486:4; 1577:24-1578:9. To ensure that the missile parts manufactured at Kaiser conformed to the approved design, the government even stationed full-time inspectors at the factory who, among other activities, ensured that only the specified materials were used. (R.T., 1485:3-1486:4). Moreover, as noted above, even after

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which the tapewrap was shipped. (R.B., pp. 26-28). As BP Chemicals conceded at trial, warnings could have been printed on the boxes, as they were beginning in 1972. Respondents' decision to present these arguments is puzzling, but perhaps is due to the fact that one of the "design defects" alleged in *Jackson v. Deft. Inc.,* from which respondents' government contractor defense arguments are duplicated, was the failure to provide warnings on the cans for the polyurethane paint that was at issue in that case. *Jackson v. Deft. Inc., supra,* 223 Cal.App.3d at 1309.

U.S. Polymeric decided to stop manufacturing asbestos-containing products, it was required to continue supplying asbestos-containing tapewrap when its products were the only ones qualified for use on a missile program. *Id., citing,* R.T., 1593:2-1594:23. The Gaylords' argument that government specifications did not require that U.S. Polymeric's tapewrap contain asbestos is directly contrary to the consistent and undisputed evidence in this matter.

U.S. Polymeric could not possibly have supplied Kaiser with asbestos-free tapewrap while still complying with its government-imposed duty to provide Kaiser with tapewrap that was required for use as in constructing ablative liners in the Poseidon and Polaris A3 second-stage rocket motor nozzles. Therefore, a "significant conflict" clearly exists between the government-approved specifications at issue in this case and the Gaylords' design defect claims. The designs of the rocket motors for the Poseidon and Polaris A3 missiles simply cannot be regulated by state tort law. *Boyle, supra,* 487 U.S. at 511 (state tort law held inapplicable to "the character of the jet engines the Government orders for its fighter planes").

As discussed above, every one of the Gaylords' arguments against applying the government contractor defense in this case lacks merit. Instead, as discussed in BP Chemicals' opening brief, the government contractor defense was clearly applicable to the Gaylords' design defect claims. Accordingly, the trial court's order striking the government contractor defense was erroneous. It would make no greater sense to hold BP Chemicals liable for alleged design defects in the products U.S. Polymeric supplied for use in the Poseidon and Polaris A3 missiles than it would to hold the contractor involved in *Boyle* liable for the alleged defects in the design of a crew escape hatch in a Naval helicopter that were at issue in that case. The Court, therefore, should reverse the trial court's ruling, and either order that judg-

ment be entered for BP Chemicals on the Gaylords' design defect claims, or remand these claims for a new trial.

IV

THE TRIAL COURT PROPERLY DENIED THE GAYLORDS' MOTION FOR COSTS PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 998

The Gaylords have appealed the trial court's order denying their motion for a costs pursuant to Code of Civil Procedure section 998. BP Chemicals opposed the Gaylords' costs motion on the basis that their section 998 offer was "illusory" because it only offered to compromise the Gaylords' noneconomic damages claims, and would have left BP Chemicals exposed to joint and several liability for their economic damages. (Tab 17, 2:4-14). The trial court denied the motion because the offer was "improperly worded *and* did not contain individual demands for each plaintiff." (*emphasis supplied*). As discussed below, the trial court's order was correct, and should be affirmed.

Section 998 vests the trial court with discretion to award costs to a prevailing plaintiff, provided that its conditions are met. CCP § 998. A prerequisite for a valid section 998 offer, therefore, is that the offer must be "realistically reasonable under the circumstances of the particular case." *Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821, 175 Cal.Rptr. 56. Because the principal purpose of section 998 is to encourage pretrial settlements (*Shain v. City of Albany* (1980) 106 Cal.App.3d 294, 299, 165 Cal.Rptr. 69), the statute cannot logically come into play unless the offer encompasses a plaintiff's entire lawsuit against the defendant to whom it is made. Section 998 cannot be construed to reward piecemeal settlement offers without undermining this principal purpose.

As the Gaylords admit in their brief, their section 998 offer only extended to each named defendant's *"several liability only, and not for a discharge of any other defendant's liability, and not for a discharge of any other claim."* (R.B., p. 32, *quoting,* Plaintiffs' Offer to Compromise, 2:2-4). The Gaylords' offer, therefore, failed to address the entirety of their action against BP Chemicals, and would have left BP Chemicals jointly and severally liable for the Gaylords' economic damages. As a result, the manner in which the section 998 offer was worded prevented any reasonable possibility of it being accepted by BP Chemicals. BP Chemicals could not have an interest in settling only the noneconomic damages claims, nor could its insurer have funded the settlement without violating its duty. Accepting the Gaylords' offer would only have "bankrolled" the litigation of their economic damages claims, which would clearly have been adverse BP Chemicals' interest. *Cf., State Farm Mutual Automobile Ins. Co. v. Crane* (1990) 217 Cal.App.3d 1127, 1136, 266 Cal.Rptr. 422 (liability insurer prohibited from offering policy limits settlement without obtaining dismissal of entire action against insured). Nor could the proffered settlement possible have prevented the Gaylords' lawsuit from going to trial, as the Gaylords would obviously have been free to continue pursuing these claims. *Cf.: Bracker v. American National Food* (1955) 284 P.2d 163, 166 (settlement of claims related to portion of shipment of goods does not bar litigation related to balance of shipment); *Home Indemnity Co. v. Mission Ins. Co.* (1967) 251 Cal.App.2d 942, 60 Cal.Rptr. 544, 562 (settlement of claims against one defendant does not bar litigation against codefendants). The denial of the Gaylord's costs motion, therefore, was clearly within the trial court's discretion, and should be upheld.

V

CONCLUSION

As shown, the judgment against BP Chemicals in this lawsuit was flawed in several respects that, singly or together, require either reversal or a remand for a new trial. As discussed above, the lack of substantial evidence identifying U.S. Polymeric's asbestos-containing tapewrap as a significant source of Mr. Gaylord's asbestos exposure, of itself, requires a reversal and entry of judgment in BP Chemicals' favor. The defects underlying the jury verdict on the Gaylords' failure-to-warn claim, combined with the trial court's error in striking the government contractor defense, also merit a reversal or, at the very least, remanding this lawsuit for a new trial. BP Chemicals respectfully submits that this Court should take the appropriate action to ensure that the law is correctly construed, and applied properly to the facts of this case.

DATED: December 20, 1993

KENNEY, BURD, KNUTSON & MARKOWITZ

By: /s/ TOM K. HAMMITT

Stephen C. Kenney
Jeffery J. Fadeff
Tom K. Hammitt
Attorneys for Defendant,
Appellant and Cross-Respondent
BP CHEMICALS (HITCO)
INC.

1 Civil No. A046190
(Alameda No. 585 915-5)

In the Court of Appeal

OF THE

State of California

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Superior Court of the State of California
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Hon. Dawn B. Girard, Judge

STEVEN KAZAN, ESQ.
KAZAN & MCCLAIN
171 Twelfth Street
Suite 300
Oakland, CA 94607
Telephone: (415) 465-7728

BRYCE C. ANDERSON, ESQ.
LAW OFFICE OF
BRYCE C. ANDERSON
1985 Bonifacio Street
Suite 201
Concord, CA 94520
Telephone: (415) 686-2300

Attorneys for Plaintiff and Appellant

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1 Civil No. A046190
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Hon. Dawn B. Girard, Judge

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE:

Appellant Larry Jackson herewith submits his opening brief in the above-entitled matter.

STATEMENT OF THE CASE

Plaintiff appeals from a summary judgment granted in favor of defendants Deft, Inc. and Koppers Company in plaintiff's personal injury products liability action. Plaintiff's action was brought on the basis that plaintiff, a civilian painter working on the United States Naval Air Station at Alameda, California, received a toxic exposure to isocyanates while using defendants' paint products to spray paint

Navy jet aircraft. [See CT 1 to 25.][1] The central issues on this appeal are whether, under summary judgment standards, defendants established as undisputed either (1) their immunity under the military contractors' defense as set forth in *Boyle v. United Technologies, Inc.* (1988) 487 U.S. , 102 L.Ed.2d 472, 108 S.Ct. 2510 or (2) the adequacy under state law of the warnings contained on the labels of their paint products.

Defendants Deft, Inc. and Koppers Company obtained a judgment in their favor following the granting of a motion for summary judgment on the foregoing two issues. [CT 1687 to 1692.] The judgment was entered on April 20, 1989. [CT 1685 to 1686.] Thereafter, by stipulation of the parties, stipulated judgments entered in favor of defendants Dexter Corporation, Sprayson Products Industrial Supply Division of Sherwin-Williams Co., DeSoto Corporation and Mobay, Inc. were entered which will stand or fall depending on the outcome of the appeal against Deft and Koppers. [CT 1723 to 1726; 1732 to 1734; 1735 to 1736; 1737 to 1738.] Plaintiff's timely appeal was filed May 31, 1989. [CT 1744 to 1746.]

STATEMENT OF FACTS

A. The inception of the litigation against Deft, Inc. and Koppers Company.

Plaintiff Larry Jackson filed a first amended complaint on November 19, 1987, against several defendants, including Deft, Inc. and Koppers Company. [CT 1 to 25.] He alleged that he had been an employee of the United States Navy at Mare Island from 1975 to 1977 and an employee of the United States Naval Air Station at Alameda from 1977 to 1985, and that during that time, as part of his employ-

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[1] The record in this case consists of a six-volume clerk's transcript on appeal and a one-volume reporter's transcript of April 5, 1989. References to the record will be indicated by the letters "CT" for clerk's transcript or "RT" for reporter's transcript, followed by the page number and, if needed, a slash (/) and the line number, of the cited material, all enclosed in brackets.

ment as a painter, he was exposed to paint products manufactured or placed into the stream of commerce by defendants and containing "toluene diisocyanate and other asthma inducing compounds" which caused him to develop a respiratory illness. [CT 9 to 10.] In July of 1983 he was diagnosed as having asthma caused by polyurethane paints; this medical diagnosis was the first time that he had any notice of his medical condition. [CT 10.] He asserted claims against defendants on theories of negligent manufacture and distribution of defective products, breach of implied warranty of fitness for use, deliberate distribution of dangerous products with conscious disregard of the safety of others, fraudulent concealment of product dangers, and market share liability. [CT 9 to 24.]

Defendants Deft, Inc. and Koppers Company each answered the complaint, denying all of plaintiff's allegations and alleging more than twenty separate affirmative defenses. [CT 31 to 40; 46 to 57.] As one of these various affirmative defenses, Koppers Company (which was answering together with Mobay Corporation) alleged:

> **Twentieth Affirmative Defense**
>
> Plaintiff's claims are barred because the product or products to which plaintiff allegedly was exposed were provided to plaintiff's employers (the United States government) pursuant to specification provided by the government, the products supplied complied with those specifications in all material respects, and plaintiff's employers and the government knew as much or more than Mobay and Koppers about any hazards associated with the use of such products. [CT 35 to 36.]

Defendant Deft, Inc. alleged the following as one of its affirmative defenses to the complaint:

> **TWENTY-SIXTH AFFIRMATIVE DEFENSE**
>
> This answering defendant alleges that the First Amended Complaint and each claim therein is barred by the doctrine of the governmental contract for immunity. [CT 52.]

Other defendants made similar allegations. [See, e.g., CT 65.]

On December 2, 1988, defendant Deft, Inc. filed a motion for summary judgment or summary adjudication of 19 enumerated issues relating to the adequacy of the warning labels and the military contractor defense. [CT 146 to 149.] Defendant Koppers noticed a similar motion on the issue of the adequacy of its warning labels either under the military contractor defense or under state law. [CT 311 to 315.][2] These motions were continued and, pursuant to the trial court's order, renoticed with an amended statement of undisputed facts and issues for adjudication. [CT 1210, 1212 to 1225; 1230 to 1236; 1409 to 1423.] The matter was eventually set for hearing on April 5, 1989. [CT 1441.]

B. The motion of Deft, Inc. for summary judgment and plaintiff's opposition to that motion.

In support of its motion on these two issues,[3] defendant Deft, Inc. submitted 15 statements of fact as being undis-

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[2] A similar motion was filed by defendant Bostik; however, that defendant settled before hearing and withdrew its motion. [See CT 1004.]

[3] Defendant also submitted two statements indicating that plaintiff had claimed exposure specifically to toluene diisocyanate, and that this

puted; they were all supported solely by the declaration of defendant's vice-president Irwin Levine and exhibits attached to that declaration. [CT 205 to 294]. These statements are as follows:

Issue A: Military contractor's Defense

1. In the late 1960's, Deft was asked for an improved urethane coating by Lockheed Aircraft Company, which had been directed by the U.S. Navy to proceed to upgrade the urethane system of the P-3 aircraft that Lockheed was building at the time.

2. The U.S. Navy prepared and issued a draft military specification at that time detailing the requirements for a weather-resistent aliphatic polyurethane coating.

3. Deft was asked to comment on the original draft military specification by the Navy. Deft provided extensive comments.

4. Deft was not asked to comment at that time on any safety issues or precautions.

5. Deft provided the Navy with whatever information it had regarding hazards associated with the use of its products at the time the original specification was prepared.

6. The original unnumbered draft specification was superceded by MIL-C-81773B(AS).

---

particular isocyanate was not used in Deft paints. [CT 1219 to 1220.] Plaintiff, however, claimed allergic reactions due to exposure to a variety of isocyanates, and not merely toluene diisocyanate. [CT 1128.] Plaintiff does not believe that this issue was the basis for the trial court's ruling, or that it has any particular significance on this appeal.

7. Deft's top coat consisted of two components, each of which were packaged separately and each of which complied with MIL-C-81773B(AS) from 1972-1978, including warnings.

8. MIL-C-81773B(AS) was amended in 1978 to provide that the precautions be provided on a separate sheet, rather than on the product itself.

9. From 1978-1980, Deft continued to comply with pre-1978 MIL-C-81773B(AS) specification. The precautions remained on the label.

10. In 1980, the Navy adopted Air Force Specification MIL-C-83286B.

11. Deft's top coat complied with MIL-C-83286B from 1980 to the present.

12. All top coats were tested by Deft to assure that they conformed to the applicable military specifications.

13. The Navy promulgated military specification MIL-C-81907 in July of 1972, which established procedures for the application of polyurethane top coats.

Issue B: Adequate Warnings

1. The warnings provided on Deft's labels as required by MIL-C-81773B(AS) were clear, understandable and completely ambiguous.

2. The warnings provided on Deft's labels as required by MIL-C-83286B were clear, understandable and completely unambiguous.

[CT 1219 to 1225.] In the declaration of Irwin Levine offered by Deft in support of its motion, Levine stated that he was a vice president in charge of industrial sales and then set forth various statements which paralleled statements 1 through 13 of Deft's undisputed facts. [CT 205 to 208.] He also identified eight exhibits, consisting of military specifications for polyurethane paints (exhibits 1, 3, 4, 7 and 8), Deft labels (exhibits 2 and 5) and a letter from Deft to the Navy regarding proposed specifications (exhibit 6). [CT 209 to 294.]

Plaintiff objected to each of these statements on the ground that Levine did not have personal knowledge of the facts stated, and that as to references to contracts with the government, Levine's declaration was not the best evidence. Plaintiff also filed separate objections to this declaration. [CT 1038 to 1047.] Additionally, plaintiff denied statements 5, 7, 8 and 9 regarding the military contractor defense, and statements 1 and 2 regarding the adequacy of the warning labels under state law. [CT 1039 to 1042.] To support these denials and objections, plaintiff submitted deposition excerpts of Irwin Levine and Ray DiMaio, declarations of Larry Jackson, Dr. John Balmes and Dr. Daniel Johnson. [CT 1023 to 1037; 1049 to 1139.]

As noted above, defendant Deft's military contractor defense was based on a declaration of Irwin Levine and extensive exhibits thereto. The deposition testimony of Irwin Levine submitted by plaintiff indicated that Deft had been working for Lockheed in developing a polyurethane paint, and that much of Levine's information was hearsay from Lockheed engineers. [CT 1055/3-25.] Levine also testified that he had no knowledge of whether Deft was able to add warnings to labels on products sold to the Navy, and that Deft had never conducted any independent investigation of health hazards associated with polyurethane paints. [CT 1087/1-21; 1091/3-7.] Levine further testified that despite

his declaration explicitly identifying certain Deft labels, he did not actually know whether, when or for what length of time those labels were used on products supplied by Deft to the Navy. [CT 1088/1 to 1089/26.] In this regard, Larry Jackson stated in a separate declaration that the lables he saw on Deft paints had simple general cautions to use with adequate ventilation, and not the warnings contained on the labels attached as exhibits to Levine's declaration. [CT 1126/8-20.] Levine also testified that he had no personal involvement in creating the labeling on Deft paint. [CT 1071/17-25.] Ray DiMaio, a vice-president of Koppers, testified in his deposition that Koppers personnel considered the military specifications to be minimums, and were free to add any information to those labels that they thought appropriate. [CT 1117/1 to 1119/2.] Comparison of the Deft labels [CT 243 to 244, 280 to 281] and the Koppers labels [CT 418 to 419] demonstrated that different companies supposedly controlled by the same specifications could format different labels. Finally, Levine testified that these same Deft polyurethane paints were sold for use on the inside of commercial aircraft, on sports helmets, on metal cabinets and on farm equipment, in containers which contained the same warning labels as those sold to the Navy. [CT 1054/1-22; 1056/14-24; 1057/2-18; 1072/7-14.]

Deft's defense of adequacy of warnings was based on the face of the labels attached to Levine's declaration. [CT 1222.] In opposition, plaintiff presented the declaration of Larry Jackson indicating that the labels he had seen on Deft products were not the labels identified by Levine, and the declaration of Dr. Daniel Johnson, a psychologist specializing in studies of the adequacy of warning labels, that the Deft labels identified by Levine did not contain adequate warnings of the dangers of allergic sensitization to isocyanates or the proper methods to avoid these dangers. [CT 1023 to 1037; 1125 to 1128.] Johnson criticized the labels because of the small size of print, the placement of warnings

after general instructions on use, and the 12th grade level language used in the warnings. [CT 1023 to 1027, 1030 to 1033.] Defendant Deft subsequently objected to the declaration of Daniel Johnson on the ground that he was not qualified as an expert witness and that the declaration was not on personal knowledge. [CT 1144 to 1147.] Deft also objected to portions of the declaration of Larry Jackson on the ground that they were not made on personal knowledge, not the best evidence, and vague and ambiguous, and objected to the declaration of Dr. John Balmes as not on personal knowledge. [CT 958 to 961.]

C. The motion of Koppers Company for summary judgment and plaintiff's opposition to that motion.

As notes above, defendant Koppers Company also moved for summary judgment on the basis of the military contractor defense and the adequacy if its warning label under state law. [CT 310 to 432.] In support of its motion, it presented the following statements which it contended were undisputed:

A. Military Contractor's Defense

1. The U.S. Navy approved reasonably precise specifications for labeling of weather resistent aliphatic polyurethane coatings.

2. Defendant KOPPERS sold a weather resistent polyurethane coating to the U.S. Naval Air Station Alameda during the period between 1977 to 1983.

3. Defendant KOPPERS did not sell any polyurethane coatings to the U.S. Navy at Mare Island during the period from 1975-1977.

4. The polyurethane coatings sold to the NAS at Alameda came in two parts. Part "A"

contained the polyester. Part "B" was the catalyst and the key ingredient is hexamethylene diisocyanate (HDI).

5. Defendant KOPPERS labeled the polyurethane coating pursuant to military specifications MIL-C-81773B(AS) and MIL-C-81773C(AS). The Navy did not require defendant KOPPERS to include a separate sheet of warnings with each polyurethane kit.

6. The Navy reserved the right to inspect every shipment by defendant KOPPERS to the NAS at Alameda. If the shipment did not comply with a military specification the Navy would contact "order processing" at defendant KOPPERS' Vernon facility. Defendant KOPPERS would then conduct an internal review of the shipment. If defendant KOPPERS agreed with the Navy, the shipment would be returned to defendant KOPPERS.

7. The U.S. Navy was aware of the hazards posed by coatings containing isocyanates.

8. The U.S. Navy did not make any complaints concerning defendant KOPPERS' compliance with the labelling requirements of MIL-C-81773B(AS) and MIL-C-81773C(AS).

9. The Navy only ordered from defendant KOPPERS polyurethane coatings pursuant to MIL-C-81773B or MIL-C-81773C. The Navy has never ordered from KOPPERS any polyurethane coatings pursuant to Air Force specifications MIL-C-83286B.

B. Adequacy of Warnings

10. Defendant KOPPERS used labels that adequately warned the user of the health hazards posed by weather resistant aliphatic polyurethane coatings.

11. Defendant KOPPERS used labels that adequately warned the user on the proper procedures to be followed when using a weather resistant aliphatic polyurethane coating.

[CT 1409 to 1423.] In support of these statements, defendant Koppers submitted the declarations of Robert Stearns, Lou Hudson, Phil Payne and Ray DiMaio, all employees or former employees of Koppers. [CT 333 to 343.] Stearns, a salesman, testified that polyurethane paints were not sold at Mare Island, but were sold at Alameda from 1977 to 1983, and that he was aware of no complaints from the Navy regarding Koppers paints. [CT 333 to 335.] Hudson, a factory representative, and Payne, his successor, also testified that they received no complaints from the Navy. [CT 336 to 339.] Ray DiMaio, a vice-president, testified that Koppers labels were prepared from military specifications, that paint and labels were prepared in response to Navy requests for bids, that the Navy exercised quality control over the product, and that it never complained about Koppers' compliance with label requirements. [CT 340 to 343.] DiMaio also identified military specifications for polyurethane paints (exhibits "A" and "C") and sample Koppers labels (exhibit "B") attached to his declaration. [CT 344 to 428.]

Plaintiff denied statements 5 through 11, and also objected that statements 8 and 9 were not made on personal knowledge. In support of his response, plaintiff submitted deposition testimony of defendant Koppers' vice-president Ray DiMaio and the declaration of plaintiff's expert

Dr. Robert Johnson. DiMaio testified in deposition that Koppers employees considered the military specifications for labelling of polyurethane paints to be minimums, and that they could put in additional information as they saw fit. [CT 1117/1 to 1119/2.] He further testified that Koppers polyurethane paints were sold to commercial users for automobile, furniture, water reservoir, pipeline, aircraft and marine uses. [CT 1106 to 1111.] Moreover, the commercial paint had exactly the same chemical composition as that sold to the military, and contained the same language on the warnings labels. [CT 1102 to 1104; 1111.]

Defendant Koppers' contentions regarding the adequacy of its warnings under state law, like those of co-defendant Deft, were based solely on the face of the labels themselves. [CT 1420 to 1421.] In response, plaintiff submitted the declaration of Dr. Daniel A. Johnson, who had also analyzed the Deft labels. Dr. Johnson concluded that the Koppers labels, like those of Deft, failed to convey the proper warnings or safety instructions to users. [CT 1023 to 1037.] He specifically noted that information regarding hazards was placed in the middle of columns on instructions in use without distinguishing size, color or placement, that some warnings were in very small type, and were also vaguely worded. [CT 1027 to 1029, 1034 to 1037.]

D. The hearing on defendants' motions for summary judgment.

On April 5, 1989, the defendants' motions for summary judgment came on for hearing. [RT 1.] The trial court sustained each evidentiary objection made by defendants, and overruled each evidentiary objection made by plaintiffs, and then granted summary judgment on both the military contractor defense and the adequacy of the warning labels. [RT 16/8 to 17/26; 20/23 to 21/7.] The order and judgment were entered April 20, 1989, and plaintiff filed his

appeal May 31, 1989. [CT 1675 to 1677, 1681 to 1682, 1714 to 1717.]

Following the decision of the trial court on the motions of Deft and Koppers, plaintiff entered into a series of stipulations with defendants Dexter Corporation, DeSoto, Inc., Mobay Corporation and Sherwin-Williams whereby it would be deemed that these defendants had moved for summary judgment on the same showing made by Deft and Koppers, and that a stipulated judgment would be entered, to be set aside in the event that plaintiff reversed the judgments obtained by Deft and Koppers. [See CT 1723 to 1726; 1732 to 1740.] Defendants Pratt & Lambert, Inc., Everseal Mfg. Co., W.M. Barr & Co., and Allied Corporation also made motions for summary judgments and obtained dismissals on the grounds that they did not manufacture, distribute or sell isocyanate paints during the relevant time period; these latter dismissals are not contested on this appeal. [See CT 640 to 690, 808 to 829, 836 to 849, 1585 to 1674.]

ARGUMENT

I. INTRODUCTION

Plaintiff Larry Jackson has suffered a severely disabling asthmatic condition as the result of toxic exposure to the isocyanates in polyurethane paints. He brought suit against Deft, Inc. and Koppers Company, two manufacturers of the paints he used in his employment at the Alameda Naval Air Station. Defendants moved for summary judgment, not disputing that their products were dangerous and caused plaintiff's injuries, but contending that the small print on their labels adequately warned plaintiff of the hazards and that, in any event, they were completely immune because their products were military equipment which complied with government specifications. Plaintiff submits that on both grounds, the trial court erred in granting summary judg-

ment. Neither of the defendants made, or could make, the necessary showing to be entitled to the military contractor defense as set forth in Boyle. Moreover, neither defendant was entitled to a ruling that, as a matter of law and without consideration of any expert testimony, their labels were adequate to warn users of the hazards involved in the use of the product.

II. SUMMARY JUDGMENT IS IMPROPER IF THERE ARE TRIABLE ISSUES SHOWN BY EITHER MOVING OR RESPONDING PAPERS

A summary judgment denies a party his right to a trial; it is considered a drastic remedy to be used with extreme caution, so that it does not become a substitute for the open trial method of determining facts. See *Gigax v. Ralston Purina Co.* (1982) 136 Cal.App.3d 591, 596, 186 Cal.Rptr. 395. It is available only when there is clearly no issue of fact, and the contentions of the parties turn on an issue of law. See *Rickel v. Schwinn Bicycle Co.* (1983) 144 Cal.App.3d 648, 653, 192 Cal.Rptr. 732. Summary judgment can be granted only when the moving party makes a showing sufficient to sustain a judgment in his favor, and the responding party has raised no triable issue as to any fact material to the moving party's showing. *Fanelli, Antuzzi, etc. Inc. v. Santa Clara U.S.D.* (1983) 141 Cal.App.3d 686, 688-689, 190 Cal.Rptr. 515. If an issue of fact is present, the court abuses its discretion in granting such motion. *Gigax, supra,* citing *Robinson v. City & Cty. of San Francisco* (1974) 41 Cal.App.3d 334, 337, 116 Cal.Rptr. 125.

A defendant moving for summary judgment must either negate a necessary element of plaintiff's case, or state a complete defense. *Fanelli, supra.* In doing so, defendant must also negate every alternative theory of liability presented by the pleadings, see *Bonus-Bilt, Inc. v. United Grocers, Ltd.* (1982) 136 Cal.App.3d 429, 442, 186

Cal.Rptr. 357, including issues which plaintiff would bear the burden of negating at trial. *Pearl v. Shore* (1971) 17 Cal.App.3d 608, 95 Cal.Rptr. 157. Negating one of two possible theories will not defeat plaintiff's case; defendant must rule out all possible merit in order to prevail. *Residents of Beverly Glen, Inc. v. Los Angeles* (1973) 34 Cal.App.3d 117, 109 Cal.Rptr. 724. If defendant does not negate every basis on which plaintiff may recover, summary judgment should be denied even if plaintiff files no opposition whatsoever. *Baldwin v. State* (1972) 6 Cal.3d 424, 99 Cal.Rptr. 145, 491 P.2d 1121.

In determining whether or not there is a triable issue of fact, the trial court must construe the moving party's affidavits strictly, and those of the opposing party liberally, with any doubts as to the propriety of summary judgment resolved against granting the motion. *Slobojan v. Western Travelers' Life Ins. Co.* (1969) 70 Cal.2d 432, 437, 74 Cal.Rptr. 895, 450 P.2d 271. The trial court must consider not only all the evidence presented by the parties, but also any and all inferences that can be reasonably drawn from any of the evidence before it. See *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 372-373, 178 Cal.Rptr. 783, 636 P.2d 1121. Even though a defendant's moving papers deny allegations made by plaintiff, if inferences in plaintiff's favor can be drawn from defendant's evidence, those inferences must be so drawn. See *Maxwell v. Coleburn* (1980) 105 Cal.App.3d 180, 184-185, 163 Cal.Rptr. 912.

The standard for determining a summary judgment motion is also the standard for reviewing it. Although the appellate court is limited to the record which was before the trial court, it determines the motion de novo, construing the moving party's papers strictly, and those of the responding party, who is appealing the summary judgment, liberally. *Classen v. Weller* (1983) 145 Cal.App.3d 27, 192 Cal.Rptr.

914; see also, *Fanelli, supra*. All doubts are resolved in favor of the appellant, and summary judgment will be reversed if any kind of case is shown. *Classen, supra; Wynner v. Buxton* (1979) 97 Cal.App.3d 166, 158 Cal.Rptr. 587.

As will be shown, under the foregoing standards summary judgment was clearly inappropriate in the present case. Even apart from the evidence submitted by plaintiff, including declarations to which the trial court erroneously sustained objections, defendants offered no evidence whatsoever to establish that their product labels were adequate to warn the ordinary users of the dangers inherent in the product's use. Without some information as to the people who are using the product and the circumstances in which it is being used, the trial court could not rule as a matter of law from the face of the label that the warnings were adequate. As to the military contractor defense, even leaving aside the valid objections which plaintiff raised, and which the trial court erroneously overruled, the defendants failed to establish the critical elements of this defense in their moving papers. They did not prove that they had military contracts, that their products were truly military equipment, that they communicated any knowledge regarding product hazards to the Navy, or that Navy specifications prohibited them from putting more extensive warnings on their labels. Additionally, as will be shown, plaintiff's opposition raised triable issues of fact on every point of this issue.

III. THE MILITARY CONTRACTOR DEFENSE IS BASED ON FEDERAL PRE-EMPTION IN AREAS OF MILITARY EQUIPMENT PROCUREMENT

The military contractor's defense has its roots in the United States Supreme Court decisions immunizing an officer of the federal government from liability for acts done pursuant to express government authorization. See, e.g., Den ex dem. Murray et al. v. Hoboken Land & Imp. Co.

(1855) 59 U.S. (18 How.) 272, 283, 15 L.Ed. 372, cited in Yearsley v. W.A. Ross Constr. Co. (1940) 309 U.S. 18, 21, 84 L.Ed. 554, 60 S.Ct. 413. In Yearsley, the Supreme Court extended this rule to include those doing construction work under contract with the government.[4] The Court's rationale was that the proper remedy was a suit against the government itself in the Court of Claims. *Yearsley, supra* at 21 to 22.

Later cases from various jurisdictions applied *Yearsley* to immunize manufacturers of military equipment from suits based upon allegations of product defect. In Sanner v. Ford Motor Co. (1976) 144 N.J.Super. 1, 364 A.2d 43, the court cited *Yearsley* and a line of cases following it to immunize an automobile manufacturer from a claim of product defect for failure to install seat belts in a military jeep. The court stated:

> To impose liability on a governmental contractor who strictly complies with the plans and specifications provided to it by the Army in a situation such as this would seriously impair the government's ability to formulate policy and make judgments pursuant to its war powers. The Government is the agency charged with the responsibility of deciding the nature and type of military equipment that best suits its needs, not a manufacturer such as Ford.

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[4] The Supreme Court appears to have made somewhat of a leap in logic in arriving at this result. The line of cases on which it relies to make the stretch from federal officers to independent contractors, culminating with Richmond Screw Anchor Co. v. United States (1928) 275 U.S. 331, 72 L.Ed. 303, 48 S.Ct. 194, are based on federal statute immunizing government contractors from patent infringement suits, and providing for a remedy directly against the federal government in the Court of Claims. *Richmond, supra* at 341 to 343. No such statute immunized general contractors in *Yearsley*.

Sanner, supra, 364 A.2d at 47. See also Casabianca v. Casabianca (1980) 104 Misc. 2d 348, 428 N.Y.S. 2d 400 (dough mixer designed and manufactured expressly for military use). In McKay v. Rockwell International Corp. (9th Cir. 1983) 704 F.2d 444, a suit by widows of Navy pilots killed due to allegedly defective ejection mechanisms in military aircraft, the United States Court of Appeal noted that under *Feres v. United States* (1950) 340 U.S. 135, 95 L.Ed. 152, 71 S.Ct. 153 and *Stencel Aero Engineering Corp. v. United States* (1977) 431 U.S. 666, 52 L.Ed.2d 665, 97 S.Ct. 2054 the federal government had immunity both for direct tort liability and for indemnity. On the basis of the policies enunciated in the *Feres* doctrine cases, as well as those in *Yearsley*, the court held that a supplier of military equipment would also be immune, stating:

> To summarize, we hold that under the *Feres-Stencel* doctrine and the government contractor rule, a supplier of military equipment is not subject to section 402A liability for a design defect where: (1) the United States is immune from liability under *Feres* and *Stencel*, (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States. The imposition of this duty to warn of known defects is necessary to enable the United States to balance the risks and benefits inherent in the use of the equipment. [Citations omitted.]

> We recognize that the term "military equipment" is somewhat imprecise, and that at some point lines will have to be drawn. We need not do so here. The line, however, lies somewhere between an ordinary consumer product purchased by the armed forces — a can of beans, for example — and the escape system of a Navy RA-5C reconnaissance aircraft. The latter falls within the term while the former does not.

See also *Tillett v. J.I. Case Co.* (7th Cir. 1985) 756 F.2d 591 and *McLaughlin v. Sikorsky Aircraft Co.* (1983) 148 Cal.App.3d 203, 195 Cal.Rptr. 764, citing and relying on *McKay* on this issue. Some courts altered the *McKay* formula by holding that the contractor could escape liability only if it proved that it participated only minimally, if at all, in the design of the product or part shown to be defective, that it timely warned the military of the risks and of alternative designs reasonably known to the contractor, and that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design. See, e.g., Shaw v. Grumman Aerospace Corp. (11th Cir. 1985) 778 F.2d 736 at 746.

In 1986, a series of cases were decided by the Fourth Circuit on this issue. See *Tozer v. LTV Corp.* (4th Cir. 1986) 792 F.2d 403, *Dowd v. Textron, Inc.* (4th Cir. 1986) 792 F.2d 409 and *Boyle v. United Technologies Corp.* (4th Cir. 1986) 792 F.2d 413. Each of these cases adopted the *McKay* formula, rejecting the approach taken in *Shaw*. The United States Supreme Court granted certiorari to resolve the conflict in the definition of the military contractor defense. See 55 USLW 3464. In *Boyle v. United Technologies Corp.* (1988) 487 U.S. , 101 L.Ed.2d 442, 108 S.Ct.2510 the Court announced its decision, favoring the

approach taken in *McKay* rather than that in *Shaw*, but clarifying the theoretical basis for the defense.

Boyle involved a suit against a military contractor for the death of a Navy helicopter pilot due to a defectively designed escape hatch. The Supreme Court initially held that, notwithstanding the absence of federal legislation immunizing military contractors from tort liability, the area of government procurement of military equipment is one involving a "uniquely federal interest" because it is related to two areas which are governed by federal law. The first area is that of the obligations to, and rights of, the United States under its contracts, and the second is that of civil liability of federal officials for actions taken in the course of their duty. Accordingly, this circumstance raised the question of whether a federal rule immunizing contractors should preempt state tort law. *Boyle, supra,* 101 L.Ed.2d at 452-454. Noting its holding in *Miree v. DeKalb County* (1977) 433 U.S. 25, 53 L.Ed.2d 557, 97 S.Ct. 2490 allowing private parties to sue as third party beneficiaries to enforce a contract with the federal government, the Court held that displacement of state law would occur only where a significant conflict exists between an identifiable federal policy or interest and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation. *Id.* at 454-455. The Court further stated:

> Between Miree and the present case, it is easy to conceive of an intermediate situation, in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed. If, for example, the United States contracts for the purchase and installation of an air conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the

> manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context.

Id. The Court noted that in the case before it, the contractor's liability was based on a state law duty of care, i.e. to deliver a safe helicopter, which was contrary to the contractual duty, i.e. to deliver a helicopter according to specifications. *Id.* at 456.

The Supreme Court specifically held, however, that pre-emption was not necessarily required merely because the government ordered a specific product:

> Even in this sort of situation, it would be unreasonable to say that there is always a "significant conflict" between the state law and a federal policy or interest. If, for example, a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered.

Id. at 455-456. The Court also noted that it was not formulating a military contractor defense under the policy considerations which led to the *Feres-Stencel* doctrine, because servicemen should not be barred from bringing suits

otherwise allowed against military contractors, and civilians should not be allowed to bring suits otherwise barred by the military contractor defense. Instead, the policy considerations were those behind the immunity conferred upon the government and its employees under the Federal Tort Claims Act, 28 U.S.C. section 1346(b), for the exercise of a discretionary function, in this case the selection of the design of military equipment. *Id.* at 456-457.

With the foregoing qualifications, the Court adopted the defense as formulated under *McKay, supra:*

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Indeed, in *McGonigal v. Gearhart Industries, Inc.* (5th Cir. 1988) 851 F.2d 774, 777, the Court of Appeal noted that *Boyle* changed only the ideological basis for the military contractor's defense, and not its substantive elements.

Since the motivating factor behind the military contractor defense is the federal government's interest in the performance of its military procurement contracts, and the immunity conferred upon its officers in performance of their authorized duty, see *Boyle, supra,* 101 L.Ed.2d at 452-454, the preconditions for the application of the *McKay* factors are that the defendant claiming it have a contract with the federal government for the supplying of military equipment. Moreover, by its citation to *Miree* and its discussion following, the Court made clear that the defense applies only when there is a conflict between the contractor's duty under state

law and its duty under the federal contract. *Boyle, supra,* 101 L.Ed.2d at 455-456. *Boyle* and its predecessors set forth a "military contractor's defense" and not a "military specifications defense." If a defendant cannot meet these preconditions and then establish each and every element of the defense as set forth in *Boyle,* it is not a defense that the product in question met specifications promulgated by a branch of the military. See *McLaughlin, supra,* 148 Cal.App.3d at 208-209; see also, *Nobriga v. Raybestos-Manhattan, Inc.* (Haw. 1984) 683 P.2d 389, 392. In the present case, as will be shown, defendants have each failed to meet one or more of the preconditions or establish one or more of the required elements of the military contractor's defense, and so their motions for summary judgment should have been denied.

IV. DEFENDANTS DID NOT ESTABLISH ALL OF THE ELEMENTS OF THE MILITARY CONTRACTOR'S DEFENSE

A. Defendant Deft, Inc. did not establish that it had a contract directly with a branch of the military.

As noted above, the first critical item of proof in a military contractor's defense is that the product which injured the plaintiff was manufactured by the defendant pursuant to a procurement contract between the defendant and a branch of the United States armed forces. See *Boyle, supra,* 101 L.Ed.2d at 453-454. One of the chief rationales of *Boyle* was that the federal government has as much of a uniquely federal interest in a military equipment procurement contract as it does in a performance contract such as the one discussed in *Yearsley v. W. A. Ross Constr. Co., supra,* 309 U.S. 18. *Boyle, supra.* This same rationale was also set forth in *McKay, supra,* 704 F.2d at 748-749, in which the Ninth Circuit also cited *Yearsley.* In *Tillett v. J.I.*

Case Co., supra, 756 F.2d 591, 598, the Seventh Circuit followed the *McKay* decision, noting:

> "We furthermore observe that, as a preliminary matter, a defendant asserting the government contract defense must prove that it supplied the product which caused the relevant injury pursuant to a contract with the Government."

Moreover, this rule also applies to the manufacturers of components; in *Wilson v. Boeing Co.* (E.D. Pa. 1987) 655 F.Supp. 766, 769-771, the federal district court upheld the military contractor defense asserted by General Electric precisely because defendant had its own contract to supply aircraft engines to the military according to precise design specification that encompassed the specific defect urged by plaintiffs. Thus, in order to assert this defense, a defendant as a starting point must produce a contract between itself and (in this case) the United States Navy for the supplying of polyurethane topcoat.

Defendant Deft, Inc. failed to meet this first critical issue. The declaration of Irwin Levine, submitted on behalf of Deft, initially indicated that Deft's contract was with Lockheed, and not the military. [CT 205/19-24.] His later statement that Deft's products were sold either to Alameda or to the GSA [CT 207/2-5] violates Evidence Code section 1500, the best evidence rule, since he failed either to produce copies of the alleged sales agreements or explain their absence. See Evidence Code section 1501, allowing secondary evidence of a writing upon proof of loss of the original, and section 1502, allowing such evidence upon proof that the original is unavailable. Plaintiff specifically raised this objection to Levine's declaration [CT 1047/1-2] and under these sections, the trial court erred in overruling the objection. See generally, *Dugar v. Happy Tiger Records, Inc.* (1974) 41 Cal.App.3d 811, 116 Cal.Rptr. 412.

B. Neither defendant in this case established that it sold military equipment.

The second critical precondition to the military contractor's defense is that the product in question is "military equipment." Just as the military contractor's defense does not apply without a military contract, a product is not "military equipment" unless it is designed and produced specifically and solely for the military; standard products which are also sold commercially to others do not come within this definition. See *Boyle, supra,* 101 L.Ed.2d at 456, in which the Supreme Court that this defense does not apply to the purchase of stock items, and *McKay, supra,* 704 F.2d at 451, in which the Ninth Circuit noted that ordinary consumer products purchased by the armed forces are not military equipment. This point was further highlighted in *Dorse v. Armstrong World Industries* (Fla. 1987) 513 So.2d 1265 in which the state court answered a question certified by the federal court as follows:

> "Moreover, the defense is inappropriate where the contract in question is to supply services or goods of a commercial, nonmilitary nature. While the question of what goods are 'commercial' is not subject to a bright-line test, we find that goods are commercial and not military in nature when they are the same or substantially similar to goods produced for sale to nonmilitary buyers. If the military is only one outlet in a larger market, the policies of strict liability will continue to require that the enterprise itself must bear the cost of the injuries it produces. It would be absurd to permit one injured party to recover damages because he was injured by a product sold in the marketplace while another is denied recompense solely be-

> cause he was injured by the same or a substantially similar product produced for a military purchaser."

While much of the remainder of the *Dorse* opinion relied on the military contractor defense as outlined in *Shaw v. Grumman Aerospace Corp., supra,* 778 F.2d 736, which was rejected in *Boyle,* the above discussion regarding the definition of "military equipment" is precisely in line with the Supreme Court's decision in *Boyle* and the Ninth Circuit opinion in *McKay.* Furthermore, as noted above, this same rule applies to the manufacturers of components. See *Wilson, supra,* 655 F.Supp. at 769-771; see also in *In re New York City Asbestos Litigation* (1989) 542 N.Y.S.2d 118 in which the court rejected the military contractor defense as urged by asbestos manufacturers, stating:

> Additional support for rejecting the military contractor defense here derives from the fact that asbestos was not exclusively used in military equipment. Since asbestos was used as insulation material for products other than military hardware, it is not by definition strictly military equipment. [Id. at 121, citing *In re Hawaii Federal Asbestos Cases* (D. Haw. 1988) No. 85-0447.]

Thus, in the present case, it is not enough for defendants to say that a jet fighter is military equipment; they must show that polyurethane paint also qualifies.

One point that should be noted is that the existence of military specifications for a product does not per se make that product military equipment. If is a fact of life that the federal government generates detailed specifications for any product which it purchases, including such mundane items as paper clips, alarm clocks and lead pencils. These products are by no stretch of the imagination military equipment.

Likewise, that a product is necessary to the military does not make the product itself military equipment. Soldiers need food, but as the Court of Appeal noted in *McKay, supra,* a can of beans is still not military equipment. Similarly, although aircraft may need paint, if that paint is a standard industrial product sold to private parties as well as to the military, it is not military equipment. In the present case, both defendants failed to meet this precondition to the military contractor's defense.

Ray DiMaio's declaration on behalf of Koppers omits any discussion of this issue altogether. However, in deposition testimony, DiMaio testified that Koppers polyurethane paints were sold to numerous commercial users, including automobiles, furniture, water reservoirs, pipe lines, aircraft and marine uses. [CT 1106 to 1111.] Furthermore, DiMaio testified there was no difference in chemical composition between the polyurethane paint which they sold to the military, and that which they sold to private industry. [CT 1102 to 1104; 1111/3-14.] Even the content of the warnings on the labels were the same. [Id.] Thus, the product which Koppers sold to the military was "the same or substantially similar to" the product sold to nonmilitary buyers, and cannot be considered military equipment.

Levine's declaration on behalf of Deft states that its product was sold to the military, but does not state that it was sold only to the military. In deposition testimony, Levine stated that Deft sold polyurethane paint to Lockheed for the interior of aircraft, and to other nonmilitary industrial users for such uses as sports helmets, cabinets and farm equipment. [CT 1054/12-22; 1056/14-24; 1057/2-18.] Levine also testified that there was no difference between the polyurethane paint sold to the military and that sold to commercial users. [CT 1057/20 to 1058/26.] Even the warning labels were the same. [CT 1072/7-14.] Under summary judgment rules, this testimony obtained in discov-

ery must be considered to supersede any self-serving declarations to the contrary which defendants submitted. See *D'Amico v. Bd. of Med. Examiners* (1974) 11 Cal.3d 1, 21-22, 112 Cal.Rptr. 786, 520 P.2d 10. Indeed, the labels on the products manufactured by Deft and Koppers state that they are for "industrial" use, and to keep away from children. [See CT 243, 244, 418 (second side).] These instructions, although undoubtedly wise, are also the hallmarks of general merchandise and not products made especially for, and sold only to, the military. This second precondition to the military contractor's defense is thus missing for each of these defendants, and summary judgment on this issue was improper.

C. Neither defendant in this case established that the design defect is an inherent and required part of the product specifications.

The fundamental principle behind the military contractor defense is the need for federal pre-emption in areas of uniquely federal interest when the requirements of state law conflict with those imposed under a federal contract. *Boyle, supra,* 101 L.Ed.2d at 454-455. Thus the defense was applied in *Tozer v. LTV Corp., supra,* 792 F.2d 403 and *Dowd v. Textron, Inc., supra,* 792 F.2d 409, in which the design defects of which plaintiffs complained were part of the specifications of the product, and correction of the defects could not have been accomplished without making an unauthorized alteration of the approved design. In *Boyle, supra,* 101 L.Ed.2d at 455-456, however, the Supreme Court noted that if there is no conflict between the contractor's duty to comply with military specifications and the state-prescribed duty of care, state products liability law would not be pre-empted. Accordingly, if the specifications do not affect the ability of the manufacturer to incorporate safety devices or warnings into its products, they do not

insulate the manufacturer from design product liability for failure to incorporate these safety devices or warnings.

Cases following *Boyle* have noted that although "failure to warn" cases are within the scope of the defense, the requirement of binding specifications precluding other warning must be met. In *Nicholson v. United Technologies* (D.Conn. 1988) 697 F.Supp. 598, 604, the district court granted summary judgment upon proof that the contents of a manual accompanying military equipment were set by required specifications, stating:

> A contractor should not be held liable for deficiencies in the contents of a maintenance manual if the contents are dictated by the government.

In *New York City Asbestos, supra,* 542 N.Y.S.2d at 120, however, the defense was rejected for several reasons, including the absence of proof that warning labels on products would have conflicted with federal specifications requirements. Similarly, in *Dorse v. Armstrong World Industries, Inc.* (S.D. Fla. 1989) 716 F.Supp. 589, in which the federal district court applied both a question previously certified to the state court and the intervening decision in *Boyle*, the court stated:

> [T]he state-imposed duty of care that is the asserted basis of the contractor's liability (warning of the danger) is not "precisely contrary" to the duty imposed by the government contract (the duty of [sic] manufacture and deliver cement containing asbestos). In fact, the evidence suggests that *no* conflict exists between the state tort duty and the federal contractual duty. The defendant's exhibit of Navy Department specifications does not contain any prohibition against health warnings on the product.

> [Footnote omitted.] Moreover, the deposition of Eagle-Picher's Director of Claims indicates that the defendant could have complied with both its state tort law duty and its Navy contract.

Id. at 591. Accordingly, defendants in the present case were required to show that federal specifications precluded other more elaborate or more visible warnings.

In the present case, each of the defendants has produced military specifications apparently calling for the labelling which it claims was on its products. Interestingly enough, however, Koppers allegedly placed a label on its product which was quite different from either of the labels used by Deft. [Compare CT 243-244 and 280-281 with CT 418 and 419.] Moreover, Koppers' employee Ray DiMaio testified that the [*Id.* at 458.] This same rationale was explained by the federal district court in the Agent Orange cases as follows:

> "Public policy does require, however, that the military's decision on those vital questions should at least be made on the basis of the readily available information. A supplier should not be insulated from liability for damages that would never have occurred if the military had been apprised of hazards known to the supplier. A supplier, therefore, has a duty to inform the military of known risks attendant to a particular weapon that it supplies so as to provide the military with at least an opportunity fairly to balance the weapon's risks and benefits."

In re Agent Orange Products Liability Litigation (S.D.N.Y. 1982) 534 F.Supp. 1046, 1055. Under the reasoning of *Boyle* and *Agent Orange*, if this policy is to be effective, the manufacturer cannot escape liability by showing that some

government official somewhere in the federal bureaucracy had information about the hazard; it must show that the officials with whom it was contracting, and who were making the discretionary decisions about product design, had all relevant information available to the manufacturer about the product hazard.

The declaration of Irwin Levine, on behalf of Deft, asserts the conclusion that he gave the government all information available to Deft, but does not state what that information was, or even how he knew exactly what information Deft possessed. [CT 206/22-25.] Plaintiff objected to this portion of the declaration on the basis of its conclusory and speculative wording and the apparent lack of declarant's personal knowledge. [CT 1046.] Ray DiMaio's declaration on behalf of Koppers establishes that the government had some knowledge about the hazard of isocyanates, but does not establish that this knowledge was equal to or greater than that possessed by Koppers. [CT 343/16-18.] Moreover, in deposition Levine indicated that the real expert in this area was a company known as Mobay, and that he had no personal knowledge of whether, and to what extent, Mobay passed on hazard information to the military. [CT 1069/16 to 1070/17.] DiMaio had never discussed the issue with the Navy, and did not know what knowledge Navy personnel had about the hazards of isocyanate paints. [CT 1119/10 to 1120/10.] Under *D'Amico, supra,* 11 Cal.3d at 21-22, this deposition testimony clearly supplanted anything to the contrary in the declarations of either Levine or DiMaio, and plaintiff's objections that neither declarant was testifying from personal knowledge [CT 1046 to 1048] should have been sustained. In any event, neither of the defendants has established this necessary element of the asserted defense.

In summary, defendants have proven nothing more than that the military used their paint products, and that

there were military specifications for these products. They have not established either the preconditions to the military contractor defense, nor the elements as set out in *Boyle* and *McKay*. Their showing is patently insufficient, and summary judgment on this issue should have been denied.

V. THE TOPCOAT MANUFACTURED BY DEFENDANTS WAS DEFECTIVE AND DID NOT CONTAIN AN ADEQUATE WARNING

Defendants Deft and Koppers also sought summary judgment on the alternative ground that as a matter of law their warning labels were adequate to warn users of the risks inherent in using polyurethane paints, and that plaintiff accordingly could not recover in any event. Defendants presented no evidence whatsoever in support of this contention other than xerographic reproductions of the labels themselves. [CT 243 to 244, 280 to 281, 418 to 419.]

Under *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443, a product is considered to be defective for products liability purposes either (1) if it fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the design of the product proximately causes plaintiff's injury and defendant fails to establish that the benefits of the design outweigh the risk of danger inherent in it. In the present case, absent considerations of any warning label on any of the defendants' paint product, an average user would not expect that the use of this product would cause him to become sensitized to isocyanates to such an extent that the slightest exposure would trigger an asthma attach. Thus, unless defendants' warning labels adequately counteracts this expectation, the products are defective under the first *Barker* test.

Defendants cited *Temple v. Velcro USA, Inc.* (1983) 148 Cal.App.3d 1090, 196 Cal.Rptr. 531 for the proposition that their warnings were adequate as a matter of law, and a complete defense to a products liability action. In *Temple,* however, defendant produced evidence that it sent warnings which were actually received and understood by plaintiffs, flatly telling plaintiffs not to use the product in question, "Velcro" fasteners, for hot air balloons under any circumstances, and that such balloons were unsafe because the fastenings were not strong enough for the purpose. Under these unique circumstances, the issue of the adequacy of the warning became one of law. Normally, however, warnings concern the methods of using a product, and not a flat statement not to use it at all. Accordingly, the adequacy of a warning is generally a fact question for the jury. See *Crane v. Sears, Roebuck & Co.* (1963) 218 Cal.App.2d 855, 859, 32 Cal.Rptr. 754. Furthermore, relevant factors in determining the adequacy of a warning include the likelihood of the occurrence of the risk and the nature and seriousness of the consequences. See *Tinkey v. E.F. Houghton & Co.* (1947) 30 Cal.2d 97, 179 P.2d 807; see generally, Hursh & Bailey, *American Law of Products Liability 2d,* sec. 8.18. Defendants in this case presented no evidence on any of these issues.

In opposition to defendants' motions, plaintiff submitted the declaration of Dr. Daniel A. Johnson noting the various inadequacies of the warning labels on each of the defendants' products. [CT 1023 to 1037.] In particular, he testified in detail in his declaration that the labels of Deft and Koppers are defective because of the size, placement and wording of the supposed consumer warnings, and the absence of information about the extent of the risks and symptoms of overexposure or repeated exposure to paint fumes. None of these issues were raised or discussed in *Temple.*

Defendant Deft objected to this declaration on the ground that were was an insufficient showing of Dr. Johnson's expertise, and therefore, certain portions of his declaration were not on personal knowledge. Dr. Johnson stated, however, that he is a psychologist, having obtained his Ph.D. degree from the Claremont Graduate School, and that his professional work involves analyzing the human factors behind warning labels, i.e. how they are perceived by the average worker, and that he was aware of the hazards connected with the use of aliphatic polyurethane coatings in the workplace. [CT 1023 to 1024.] This testimony was more than adequate to demonstrate that he is a person with "special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates." Evidence Code section 720, subd. (a). The trial court erred in sustaining defendant's objection to this testimony, particularly under summary judgment standards requiring that the responding party's affidavits be construed liberally. See *Slobojan, supra,* 70 Cal.2d at 437.

Aside from the triable issues raised by Dr. Johnson's testimony, defendants did not present sufficient evidence to be entitled to summary judgment on this issue. Although defendants did not specifically so state, it must be inferred in absence of any contrary evidence that the labels on their products were no larger than the xerographic copies which were attached to the declarations of Levine and DiMaio. In light of the fact that these are labels for paint cans, to be used by blue collar workers in circumstances in which parts of labels can be obscured by spilled paint, the fine print on the Deft labels patently do not meet requirements of *Burke v. Almaden Vinyards* (1978) 86 Cal.App.3d 786, 772, 150 Cal.Rptr. 419 that the warning be "appropriate and conspicuous." Accordingly, defendants were not entitled to summary judgment or summary adjudication on the issue of the adequacy of their warning labels, and the trial court

committed a prejudicial abuse of discretion in granting their motions.

VI. CONCLUSION

Defendants Deft, Inc. and Koppers Company failed to establish a basis for summary judgment either on the military contractor defense or on the adequacy of their warning labels. Even aside from the trial court's evidentiary rulings, which for the reasons stated above plaintiff submits were prejudicially erroneous, defendants failed to submit evidence to establish several elements of the military contractor defense, and submitted no evidence in support of their claim that their warning labels were adequate to warn plaintiff of the dangers of contracting asthma from isocyanate exposure. Summary judgment was patently improper under these circumstances.

For the foregoing reasons, plaintiff and appellant respectfully submits that the judgments in favor of defendants Deft and Koppers should be reversed and remanded with directions to deny the motion for summary judgment, and that in accordance with the stipulations of the parties, the trial court should be directed to set aside the judgments in

favor of defendants Dexter, DeSoto, Mobay and Sherwin-Williams.

Dated: December 18, 1989

Respectfully submitted,

KAZAN & MCCLAIN

and

LAW OFFICES OF BRYCE C. ANDERSON

By: /s/ BRYCE C. ANDERSON

Bryce C. Anderson
Attorneys for Plaintiff

PROOF OF SERVICE BY MAIL — CCP 1013A, 2015.5

I declare that I am a resident of, and employed in the County of Contra Costa, State of California. I am over the age of eighteen years, and not a party of the within entitled cause. My business address is 2321 Stanwell Drive, Concord, CA 94520. On December 18, 1989, I served the within **APPELLANT'S OPENING BRIEF** on the interested parties in said cause by placing a true and correct copy thereof in a sealed envelope, postage prepaid, in the United States mail at Concord, California, addressed as follows:

Steven M. Marden, Esq.
Larson, Burnham & Trutner
P.O. Box 119
Oakland, CA 94604

Mark Oium, Esq.
O'Connor, Cohn,
Dillon & Barr
151 Union Street, Suite 551
San Francisco, CA 94111

Lawrence Margoles, Esq.
Dryden & Margoles
One California Street, #3125
San Francisco, CA 94111

Clerk, Supreme Court
State of California
State Building, Room 4250
455 Golden Gate Avenue
San Francisco, CA 94102
(5 copies)

Anthony T. Topolsky, Esq.
Williams, Kelly, Polverari
& Skelton
1775 Woodside Road, 2nd Fl.
Redwood City, CA 94061

Jane A. Corning, Esq.
Lynch, Loofbourrow,
Helmenstine, Gilardi
& Grummer
P.O. Box 7045
San Francisco, CA 94120

Clerk, Superior Court
County of Alameda
1225 Fallon Street
Oakland, CA 94607

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed December 18, at Concord, California.

/s/ ANNA M. ZANDONELLA
Anna M. Zandonella

PROOF OF SERVICE

I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is Four Embarcadero Center, 25th Floor, San Francisco, California 94111.

On December 21, 1993, following ordinary business practices, I placed for collection and mailing at the offices of Kenney, Burd, Knutson & Markowitz, located at Four Embarcadero Center, 25th Floor, San Francisco, California 94111, a copy of the attached **BP CHEMICALS (HITCO) INC.'S REPLY TO GAYLORDS' OPPOSITION BRIEF AND OPPOSITION TO GAYLORDS' OPENING BRIEF IN CROSS-APPEAL** in a sealed envelope with postage thereon fully prepaid, addressed as follows:

Hand Delivery to:

Court of Appeal for the State of California
First Appellate District
303 Second Street,
South Tower, Suite 600
San Francisco, CA 94107
(original + 5 copies)

California Supreme Court
303 Second Street,
South Tower, 8th Floor
San Francisco, CA 94107
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All others via First Class Mail:

San Francisco County Superior Court
City Hall,
400 Van Ness Avenue,
Room 317
San Francisco, CA 94102
(one copy)

Bryce Anderson, Esq.
Law Offices of Bryce C. Anderson
1985 Bonifacio Street,
Suite 102
Concord, CA 94520
(one copy)

I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course

of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 21, 1993, at San Francisco, California.

/s/ SHARON K. PROSSER
Sharon K. Prosser

APPENDIX 20

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION FOUR

ROBERT GAYLORD et al., Plaintiffs, Cross-Appellants and Respondents, v. BP CHEMICALS (HITCO) INC., Defendant, Cross-Respondent and Appellant.	A059183 (San Francisco Super. Ct. No. 891562)

Defendant, BP Chemicals (Hitco), Inc. (hereafter BP Chemicals), appeals from a judgment in favor of plaintiffs, Robert Gaylord (Gaylord) and Janet Gaylord, in an action for personal injuries stemming from Gaylord's workplace exposure to asbestos. Plaintiffs likewise appeal from an order denying them prejudgment interest and expert witness fees under Code of Civil Procedure section 998.[1]

FACTS

Gaylord went to work for Kaiser Aerospace in 1956 as a machinist. Between that time and 1987 when he was forced by ill health to stop working he spent much of his career operating a tracer lathe which finished missile parts. The parts which came to him until the early 1980's for finishing were covered with an ablative tape which contained asbestos. The asbestos in the tape acted to shield the nose cones and rocket nozzles from the high temperatures which occurred during firing and flight. Some of the asbestos tape

[1] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

used by Kaiser Aerospace was supplied by U.S. Polymeric, a predecessor to BP Chemicals.

In the area in which Gaylord worked up to 35 lathes might be operating at one time. The finishing process released large quantities of asbestos-laden dust into the air. During the entire period of his employment at Kaiser, Gaylord was a smoker who smoked on average half a pack a day.

In 1987 Gaylord had a chest x-ray which revealed what was eventually diagnosed as being lung cancer. Although he was initially treated with radiation therapy, a recurrence of the disease in 1990 required surgery. A portion of his lung tissue was removed at the time of the surgery and subjected to examination by a pathologist.

Gaylord's claim was consolidated for trial with that of another asbestos plaintiff. The trial was bifurcated and the first phase of the trial dealt with the issues of medical causation and damages. After the first phase the jury returned a special verdict finding that Gaylord's injury was caused by asbestos exposure and that it could not apportion his injury between his smoking and his asbestos exposure. It awarded Gaylord $5,000 for future medical monitoring, $234,000 for medical damages, $865,000 for lost wages and earning capacity and $200,000 in non-economic loss. Janet Gaylord was awarded $200,000 on her loss of consortium claim.

Phase two of the trial addressed the questions of defendant's liability and Gaylord's contributory negligence. At its conclusion the jury returned verdicts finding that defendant's tape was defective in design, that the company had failed to provide adequate warnings, that Gaylord was exposed to asbestos contained in defendant's tape and his exposure was a legal cause of his injury. Finally, the jury

apportioned defendant's fault at 25 percent of Gaylord's injury.

APPEAL

DISCUSSION

On appeal defendant raises several claims of error. It argues that there is no substantial evidence to support the finding that Gaylord's injury resulted from exposure to its products or the finding that it breached its duty to warn. Defendant also argues that the court erred as a matter of law by ruling that the government contractor defense was inapplicable and by bifurcating the trial. Lastly, defendant maintains that the damages awarded to Gaylord for future medical expenses are excessive.

1. Substantial Evidence Claims

In reviewing defendant's claim that there is no substantial evidence to support certain findings this court must resolve all conflicts in favor of the Gaylords and accord their verdict the benefit of every reasonable inference. *(Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544.)

Defendant argues that first, there was no substantial evidence that asbestos, rather than smoking, was the cause of Gaylord's cancer, and second, that its asbestos containing products formed only a small portion of the asbestos to which Gaylord was exposed.

There was ample evidence before the jury that Gaylord has been a smoker for over 30 years and had smoked at least half a pack of cigarettes a day until he became ill with what was eventually diagnosed as lung cancer. Although one expert (Morgan) testified that Gaylord's exposure to asbestos was not a substantial factor in causing his lung cancer and another (Hammar) that a pathological exam of the removed portions of Gaylord's lung tissue did not permit a

diagnosis of asbestosis, there was also expert testimony (Hammar) that the type of cancer from which Gaylord suffered is associated with exposure either to cigarette smoking or to asbestos. Moreover, there was expert testimony (Hammar) that a high level of asbestos exposure alone would have been sufficient to have caused Gaylord's lung cancer. Another expert (Smith) testified that even a relatively brief exposure to asbestos was sufficient to substantially elevate the risk of eventually contracting cancer.

Defendant also maintains that even if asbestos caused Gaylord's lung cancer the asbestos containing products it supplied to his employer would have been only a very small portion of the asbestos to which he was exposed. It was undisputed that Gaylord worked as a lathe operator to varying extents on the Advanced Minuteman, Pershing and Polaris missile systems. Defendant points to Gaylord's testimony that he had machined 80-90 percent of the Advanced Minuteman parts and points out that it did not supply asbestos tape for that missile program, only for the Polaris and Poseidon programs. There was also evidence, however, that Gaylord's employer was a major customer for defendant during certain periods in the 1960's and 1970's. Due to the passage of time it was no longer possible to quantify the amount of asbestos containing products defendant supplied to the company prior to 1969. Defendant was, however, the sole supplier to the company of the asbestos tape used on Poseidon nose cones.

There was ample testimony that the area in which Gaylord worked side by side with up to 35 other lathe operators was filled with dust from the machining process. Various vacuum systems were installed by the company to remove the dust, but it was not until 1982 that respirators were supplied to the lathe operators.

There was more than enough evidence to support the jury's finding that Gaylord was exposed to the asbestos

containing products manufactured by defendant and that asbestos was a substantial factor in causing his lung cancer.

Defendant also asserts that there was no substantial evidence to support the jury's finding that it had breached its duty to warn of the risks associated with use of its ablative tape. Defendant maintains that "the evidence was undisputed that [it] did not know, nor could it have known, of the specific hazard that caused Mr. Gaylord's lung cancer. The jury found that this hazard was the combined, synergistic effect of cigarette smoking and asbestos exposure . . . ." Defendant argues that the synergistic effect was not widely known until the late 1970's after it had stopped using asbestos in its products.

As an initial matter the jury did not make a finding that Gaylord was injured by the synergistic effect of cigarette smoke and asbestos fibers. The theory was certainly argued to it, but no such finding was made. Even if it had made such a finding, the risk to which Gaylord was exposed was lung cancer. There was testimony establishing that the link between lung cancer and asbestos exposure was widely known in the early 1950's. Accordingly, one witness testified that some asbestos products carried warnings by the mid-1960's, and by the early 1970's "six or eight of the major manufacturers" put "warnings about the dust hazard on their products."

In order for a plaintiff such as Gaylord to recover under a strict liability theory for failure to warn he need only show "that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002.)

It was undisputed that defendant did not supply any warnings on its products until 1972 or 1973. Likewise, defendant conceded that it knew that the lathing process created dust. There was sufficient evidence from which the jury could infer that defendant knew asbestos exposure put workers at increased risk for lung cancer and that it should therefore have provided warnings that inhaling the dust while lathing parts covered with its ablative tape was a hazard.

Defendant also argues that, in any event it would have been to no avail for it to have included warnings in literature supplied with the tape because in Gaylord's case once the tape was received at the company it was removed from its packaging by another department, applied to the nose cones and autoclaved before Gaylord ever saw it. Thus, defendant contends any warnings included on the packaging would not have come to Gaylord's attention even if it had provided such warnings.

Arguing that a manufacturer has no duty to warn where a warning could not reduce the risk of harm, defendant relies on *Rosburg v. Minnesota Mining & Mfg. Co.* (1986) 181 Cal.App.3d 726, 734-735. In *Rosburg* the plaintiff argued that the maker of a breast implant had a duty in the years following her implant to warn physicians that many of its implants had begun to spontaneously deflate. (*Id.* at p. 734.) The trial court rejected that argument first because it found the warnings given at the time of the surgery sufficiently cautioned that the long term use of the implants was not guaranteed, and second, because it found that the physician knew at the time of the surgery that there was a risk of spontaneous deflation. (*Id.* at p. 735.) Accordingly, the court found that "no harm could have been caused by failure to warn of a risk already known. [Citation.]" (*Ibid.*)

This is not a case in which there was a warning given, but plaintiffs have attacked it as inadequate either in

describing the risk or not being designed to reach the intended user of the product. Gaylord testified that it was only in the 1970's that he learned that asbestos posed a health risk. Defendant can scarcely maintain that it had no obligation to provide warnings about its asbestos containing products simply on the ground that it is possible that might not have been passed on to user employees like Gaylord.

2. Government Contactor Defense

Defendant contends that the trial court erred as a matter of law by denying defendant's motion for a directed verdict made on the basis that the military contractor's defense barred plaintiffs' claims and by directing a verdict for plaintiffs to the effect that the defense did not apply.

The government contractor defense was analyzed in some detail by *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500. In *Boyle* the father of a United States Marine brought suit against an aircraft manufacturer after his died in a helicopter accident. (*Id.* at p. 502.) The claims under state tort law included one for defective design of the escape system. (*Id.* at p. 503.) The *Boyle* court concluded that the federal interest in the procurement of military supplies will require displacement of duties of care imposed under state law only when there is a "significant conflict" between the federal policy or interest and the operation of state law. (*Id.* at p. 507.) *Boyle* was clear that this form of pre-emption is not automatic as when a state seeks to regulate in a field traditionally occupied by federal legislation. (*Ibid.*) "[T]o put the point differently, the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can. *But conflict there must be.*" (*Id.* at pp. 507-508.) (Emphasis added.)

Finding that in the case before it there was a significant conflict between the duty imposed by state law (escape

hatch mechanisms of the sort plaintiff believed were safest) and the duty imposed by the federal policy or interest (escape hatch mechanisms consistent with the government's specifications), the court concluded that state law must be displaced. (*Boyle v. United Technologies Corp., supra,* 487 U.S. at p. 509.)

Defendant complains that the trial court erred in focusing upon the fact that the ablative tape was sold commercially before it was sold to the government; in short, the product was an off-the-shelf one which happened to meet government specifications for certain missile contracts. Defendant argues that instead of focusing upon whether the tape was military equipment the court should have looked to whether the missiles themselves were military equipment. We need not reach that issue because the problem here is that defendants were unable to demonstrate a "significant conflict," indeed any conflict, between their state duty to warn and the government specifications for the tape.

Absent some showing that there was a conflict, the very rationale for permitting the defense collapses. At trial an employee of U.S. Polymeric testified that there was nothing in the government specifications which precluded warning literature packaged with the tape. He also testified somewhat ambiguously that it was merely an "unwritten agreement" not to risk contaminating the tape by printing on its exterior wrapping.

It was thus undisputed that defendant could have complied with its state law imposed duty to supply warnings without impinging upon its duty to supply the product called for in the government specifications. (*In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 813 [makers of asbestos insulation were not acting in compliance with government specifications where the specifications would not have precluded warning so government contractor de-

fense not available].) The trial court did not err in ruling the government contractor defense was inapplicable here.

3. Bifurcation

The case was bifurcated under the General Orders applicable to asbestos litigation in San Francisco Superior Court. At the time the court ordered bifurcation counsel for another defendant objected, stating that, since the primary issue as to his client was one of product identification and exposure (issues which would be determined only in the second phase of the trial), bifurcation would be unduly costly. Counsel for BP Chemicals added that he wished to join in the objection. He did not expand at all upon the basis of his objection.

On appeal defendant now complains that he was deprived of the opportunity to introduce evidence from an expert witness on comparative fault. The witness, Dr. Hinkes, would have testified on comparative fault, allocating the principal blame to Gaylord because of his smoking history. The trial court refused to permit Dr. Hinkes to testify in phase two on the question of the cause of Gaylord's lung cancer because by that stage of the trial the jury had concluded that it was unable to apportion causation. Defendant then apparently elected not to call Dr. Hinkes.

Defendant had a duty when objecting to the bifurcation to tell the trial court how it was being injured by the order. Having failed to do that at trial, it now tries to complain that it was precluded from introducing evidence on comparative fault. The problem here was not the trial court's bifurcation order, but as the judge noted, the jury's reluctance to accept defendant's theory that causation could be apportioned between asbestos exposure and smoking. Assuming that defendant preserved the issue, we are unpersuaded that the trial court erred in ordering bifurcation.

4. Damages for Future Medical Expenses

The jury awarded Gaylord $177,000 for future medical expenses which defendant contends is excessive. Defendant argues that Gaylord had only spent $57,000 on medical treatment up to the date of trial, and that the medical testimony suggested there were very few treatment options available to him given the advanced state of his cancer. Thus, defendant argues on award of three times what Gaylord had already spent on medical care must represent the result of passion or prejudice.

There was testimony that were Gaylord's cancer to recur and were he to opt for aggressive treatment of it, as he had done in the past, his medical costs would be "at least" a $100,000 a year. The same witness testified that nursing care currently costs $150 per eight-hour shift. Given this testimony we cannot say that the award "is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919.)

PLAINTIFFS' APPEAL

Prior to trial plaintiffs made an offer to compromise pursuant to section 998. The offer was made to three defendants of which BP Chemicals was one. Each defendant was listed separately but the amount of the offer as to each was $49,999. The offer stated that "[p]laintiffs ROBERT GAYLORD and JANET GAYLORD hereby offer to compromise with each defendant . . . in compromise of its several liability only, and not for a discharge of any other defendant's liability, and not for a discharge of any other claim."

In denying plaintiffs' motion for costs the trial court concluded that they were "not entitled to costs pursuant to C.C.P. §998 because the §998 demand was improperly

worded and did not contain individual demands for each plaintiff." At the hearing on the motion the court noted that the language in the offer to compromise "several liability only" could easily be read to mean that acceptance of the offer was settlement only of the non economic portion of plaintiffs' claim. (Civ. Code, § 1431 et seq.)

It is the general rule that a joint settlement demand made by more than one plaintiff will not trigger section 998 penalties because there is often no way to tell whether each plaintiff's recovery at trial was, as the section requires, "more favorable" than the offer. In *Hurlbut v. Sonora Community Hospital* (1989) 207 Cal. App.3d 388, a minor child and her parents sued the hospital in which she was delivered for medical malpractice. The plaintiffs made a joint offer to compromise under section 998 which consisted of a structured settlement. (*Id.* at p. 407.) Because the plaintiffs had offered no evidence as to the present value of the structured settlement they had failed to carry their burden to show that the judgment they obtained was more favorable than their settlement offer. (*Id.* at p. 409.) (Accord, *Gilman v. Beverly California Corp.* (1991) 231 Cal. App.3d 121, 124.)

If, however, it is unquestionably clear that the plaintiff has recovered more at trial than he or she could have from the joint offer it is proper to impose section 998 penalties. Thus in an action for personal injuries when a minor child and her mother made a joint offer to compromise for $1,000,000, and the mother subsequently dismissed her only claim, once the child received an award in excess of $23,000,000, the child had clearly obtained an award in excess of her settlement offer. (*Fortman v. Hemco, Inc.* (1989) 211 Cal. App.3d 241, 249, 263; accord, *Stallman v. Bell* (1991) 235 Cal.App.3d 740, 747 [single offer by two plaintiffs could be compared to single recovery by them], and *Winston Square Homeowner's Assn. v. Centex West,*

Inc. (1989) 213 Cal.App.3d 282, 294 [joint offer by defendants permits section 998 fees for defendant who is dismissed on statute of limitations].)

The reasoning of *Fortman* is applicable here. In this instance even if we assume that the entire amount of the joint settlement offer is $49,999 should be attributed to Mrs. Gaylord, her recovery of at least $50,000 exceeded the offer of compromise.[2] (As to Gaylord the issue is even clearer since his net recovery was $931,159.) Moreover, even though the offer to compromise could, as the trial court suggested, be read as an offer for only the non-economic damage claims, the $50,000 net recovery realized by Janet Gaylord was wholly for her non-economic loss of consortium claim. Thus, even if the offer is read in the most restrictive manner possible her result at trial was more favorable than the offer. Accordingly, the trial court erred in denying plaintiffs pre-judgment interest and reimbursement for expert witness fees as provided by section 998.

DISPOSITION

The judgment is affirmed, but the matter is remanded to the trial court for determination of the appropriate award to plaintiffs of pre-judgment interest and reimbursement of their expert witness fees.

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[2] The jury returned a verdict for Gaylord in the amount of $1,304,000 and for Janet Gaylord in the amount of $200,000. After adjustments for settlement and the operation of Civil Code section 1431.2 the net judgment realized by Gaylord was $931,159 and for Mrs. Gaylord it was $50,000.

As the prevailing party in both appeals plaintiffs are entitled to an award of their costs on appeal.

Poché, Acting P.J.

WE CONCUR:

Perley, J.

Reardon, J.

Gaylord v. BP Chemicals
A059183

Kenney, Burd & Markowitz
Kenney, Stephen C.
4 Embarcadero Ctr.
Suite 2500
San Francisco, CA 94111

A059183

APPENDIX 21

316 STEPHEN C. KENNEY, ESQ. (State Bar No: 053883)
TOM K. HAMMITT, ESQ. (State Bar No: 145852)
KENNEY, BURD & MARKOWITZ
Two Embarcadero Center, Suite 740
San Francisco, California 94111
Telephone: (415) 397-3100

Attorneys for Respondent and Cross-Appellant
BP CHEMICALS (HITCO) INC.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT — DIVISION FOUR

ROBERT and JANET GAYLORD,

Plaintiffs, Respondents, Cross-Appellants,

v.

BP CHEMICALS (HITCO) INC.,

Defendants, Appellant, Cross-Respondent.

Action No: AO 59183

San Francisco Superior Court
Action No: 891562

PETITION FOR REHEARING

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BP CHEMICALS (HITCO) INC. ("BP Chemicals") respectfully submits the following petition for rehearing in the above-captioned matter.

I

INTRODUCTION

BP Chemicals requests a rehearing of this matter to direct the Court's attention to arguments that may have been overlooked in the July 12, 1994, memorandum opinion, leading the Court, erroneously, to affirm the judgment for plaintiffs below, and to reverse the trial court's order denying the plaintiffs' claim for costs and interest under Code of Civil Procedure section 998.[1]

On rehearing, BP Chemicals seeks to direct the Court's attention to two areas: (1) the jury's special verdict that Gaylord was contributorily negligent for smoking which was not considered in the Court's analysis affirming the jury's verdict on the plaintiff's failure-to-warn claim (Opinion, pp. 5-8); and (2) the Court's reversal of the trial court's order denying the plaintiffs' claim for costs and interest under Code of Civil Procedure section 998, in which the Court ruled that a plaintiff is entitled to a section 998 recovery even though the underlying offer was only to compromise a portion of his action against the involved defendant. (Opinion, pp. 12-14).

Had the Court considered the contributory negligence verdict in conducting its failure-to-warn analysis, the only inference that would have been logically possible from the special verdict findings is that the jury found that Gaylord's cancer was caused by the "synergistic effect" of cigarette smoking and asbestos exposure. Had it made this determi-

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[1] For convenience, a copy of the opinion is attached hereto as exhibit A.

nation, BP Chemicals believes the Court would have considered the holdings of the cases discussed in BP Chemicals' opening and reply briefs specifying the warnings required in toxic tort cases involving injuries caused by synergistic effects. (*See*: Appellant's Brief ("A.B."), pp. 32-34; Appellant's Reply ("A.R."), pp. 11-13). Had the Court considered these cases, the judgment against BP Chemicals would have been reversed, as the synergistic effect of cigarette smoking and asbestos exposure, the adjudicated cause of Gaylord's cancer, was unknown until years after BP Chemicals stopped supplying asbestos-containing products to Gaylord's workplace. (A.B., pp. 8, 32-33). Had the Court considered the contributory negligence verdict, therefore, it should have held that BP Chemicals did not breach any pertinent duty to warn in this matter. *Anderson v. Owens-Corning Fiberglass Corp.* (1991) 53 Cal.3d 987, 1000.

BP Chemicals also contends that the Court erred in granting the plaintiff's cross-appeal from the trial court's order denying their section 998 claim for costs and interest. As the Court recognized in the memorandum opinion, the plaintiffs' statutory offer was only to compromise their noneconomic damages claims against BP Chemicals. (Opinion, p. 14). Had the offer been accepted, the plaintiffs' substantial economic damages claims would have remained for trial. Section 998 penalties cannot reasonably be invoked where, as here, the underlying offer was only to compromise a portion of the plaintiffs' action.

II

ARGUMENT

A. The Court Did Not Consider the Finding of Contributory Negligence in Analyzing the Failure-to-Warn Judgment, From Which the Only Possible Inference Was that Gaylord's Cancer Was Caused by the Synergistic Effect of Cigarette Smoke and Asbestos Exposure

The judgment against BP Chemicals was comprised of the jury's special verdicts on several issues. These included the special verdicts that: (1) exposure to BP Chemicals' asbestos-containing products was a legal cause of Gaylord's cancer; (2) the evidence did not allow the cause of Gaylord's cancer to be reasonably apportioned between his asbestos exposure and cigarettes or other causes; (3) Gaylord was negligent for smoking; and (4) Gaylord's smoking was a legal cause of his injuries. (Opinion, pp. 2-3; *see*, Entry of Judgment on Special Verdict (Joint Appendix, Tab 8, pp. 149-162).[2] The jury also found that BP Chemicals' asbestos-containing products were defectively designed, and that the company "fail[ed] to give adequate warning of potential risks which are known or in the exercise of reasonable care should have been known." *Id.*

BP Chemicals' principal contentions on appeal are that the government contractor defense shields it from liability on the plaintiffs' design defect claim (A.B., pp. 15-30), and that the failure-to-warn judgment was not supported by substantial evidence. (A.B., pp. 30-37). The Court did not address the government contractor defense in the opinion, other than to explain that the defense does not apply to

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[2] For convenience, copies of the two special verdict forms involved in this matter are attached hereto as exhibit B.

failure-to-warn claims. (Opinion, p. 9). Instead, the Court's affirmance of the failure-to-warn judgment was dispositive.

In analyzing the failure-to-warn judgment, however, the Court did not consider the jury's finding that Gaylord was contributorily negligent for smoking. This critical omission caused the Court to rule, erroneously, that "the jury did not make a finding that Gaylord was injured by the synergistic effect of cigarette smoke and asbestos fibers. The theory was certainly argued to it, but no such finding was made." (Opinion, p. 6). The Court affirmed the jury verdict on the basis that BP Chemicals did not provide warnings of general asbestos health hazards on the boxes in which its products were shipped before the 1970s, even though such hazards were knowable. (Opinion, p. 6). Because it did not consider the contributory negligence finding, the Court did not consider the crucial question of whether BP Chemicals had a duty to warn of the synergistic effect of cigarette smoking and asbestos even to be an issue.

The Court was required to consider the contributory negligence verdict in analyzing the failure-to-warn judgment. Had it done so, the Court would have determined that the only possible inference from the special verdicts was that the jury had found that Gaylord's cancer was caused by the synergistic effect of cigarette smoke and asbestos, not by smoking or asbestos alone. Because it is undisputed that this synergistic effect was not known under the "generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution" of BP Chemicals' asbestos-containing products, the Court would have reversed the failure-to-warn judgment had it considered the contributory negligence verdict. *Anderson v. Owens-Corning Fiberglass Corp., supra,* 53 Cal.3d at 1002.

1. The Court Should Have Considered the Contributory Negligence Verdict in Analyzing the Failure-to-Warn Judgment

The Court will affirm a jury finding that is supported by substantial evidence. *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544, 138 Cal. Rptr. 705; *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429, 45 P.2d 183. By corollary, the Court should not disregard a properly supported verdict in analyzing a judgment on appeal. Because the evidence supporting the contributory negligence finding was overwhelming, the Court should have considered the jury's determination in analyzing the failure-to-warn judgment.

The contributory negligence finding was comprised of two special verdicts: that smoking was a legal cause of Gaylord's cancer; and that Gaylord was negligent for smoking. As discussed in the briefs, the evidence implicating smoking as a cause of Gaylord's cancer was both undisputed and overwhelming. (A.B., p. 5; Respondents' Brief ("R.B."), pp. 12-13).

Gaylord smoked for 34 years, until only two months before he was diagnosed with lung cancer. (A.B., p. 5, *citing*, RT, 300: 36-27; 383:250384:2). He smoked an average of one-half to three-quarters of a pack of cigarettes per day, and as much as two packs per day during some periods. (A.B., p. 5, *citing*, RT, 255:5-21; Respondents' Brief ("R.B."), p. 12). The plaintiffs admit that Gaylord's cancer was related to his cigarette smoking, consistent with the position taken by all of their trial experts. (R.B., p. 12). The plaintiffs also admit that the enormous amount of expert testimony they proffered to establish the synergistic effect between smoking and asbestos exposure "necessarily implicates smoking." (*Id.*).

The contributory negligence verdict was more than adequately supported. Therefore, the Court should have considered it in determining the appeal from the failure-to-warn judgment.

2. Had the Contributory Negligence Verdict Been Considered, the Court Should Have Ruled That the Adjudicated Cause of Gaylord's Cancer Was the Synergistic Effect of Cigarette Smoke and Asbestos

When the contributory negligence verdict is considered along with the other special verdict findings, the only possible inference is that the jury found Gaylord's cancer was caused by the synergistic effect of smoking and asbestos exposure, not by either exposure alone or by the two operating in simple conjunction. The adjudicated cause of Gaylord's cancer, therefore, was the synergistic effect.

a. The Only Possible Conclusion From the Special Verdicts Is That the Jury Found Gaylord's Cancer Was Caused by the Synergistic Effect of Smoking and Asbestos Exposure

The special verdicts included findings that Gaylord's cancer was related to both smoking and asbestos, and that apportionment between these factors was not possible under the evidence submitted. (Entry of Judgment on Special Verdict (Joint Appendix, Tab 8, pp. 149-162)). As noted, the plaintiffs admit that the jury verdicts related to causation necessarily implicated smoking as well as asbestos.

Even when considered abstractly, there are only two possible causation scenarios that can be reconciled with the special verdicts, including the contributory negligence finding: (1) that the jury found that smoking and asbestos, acting separately but at the same time, caused Gaylord's cancer; or (2) that Gaylord's cancer was caused by his

exposures to cigarette smoking and asbestos acting in synergy. When considered in the context of the evidence submitted at trial, however, only the second scenario can be supported. The only possible conclusion from the special verdicts, therefore, is that the adjudicated cause of Gaylord's cancer was the synergistic effect of smoking and asbestos exposure.

The possibility that the jury found that Gaylord's cancer was caused by smoking and asbestos acting separately must be discounted because there is no substantial evidence to support it. This scenario assumes that the jury could have found that smoking and asbestos caused Gaylord's cancer in a manner akin to two negligent automobile drivers causing an accident injuring third parties, a scenario in which apportionment is normally feasible. The special verdict that the evidence was insufficient to permit the jury "to reasonably apportion the cause of Robert Gaylord's lung cancer" between smoking and asbestos, however, militates against this possibility. As noted in the opinion, the jury totally rejected BP Chemicals' defense theory "that causation could be apportioned between asbestos exposure and smoking." (Opinion, p. 11).

The possibility that the jury may have found that smoking and asbestos, acting separately, caused Gaylord's cancer is conclusively negated by the absence of any expert medical testimony that the jury could have credited that is consistent with the special verdict finding that causation could not be apportioned. All of the plaintiffs' experts held the opinion that causation could not be apportioned for the reason that Gaylord's cancer was caused by the synergistic effect of smoking and asbestos, not by the two exposures acting separately. (A.B., p. 8, *citing*: RT, 296:27-297:6 (testimony of Dr. Barry Horn); RT, 51:13-512:22 (testimony of Dr. Allan Smith); RT, 617:1-13 (testimony of Dr. Samuel Hammar)). As discussed below, the plaintiffs' evi-

dence showed that it is not possible for smoking and asbestos to act separately in causing cancer because of their inevitable synergistic effect.

The plaintiffs admit that their only causation theory at trial was that Gaylord's cancer was caused by the synergistic effect of smoking and asbestos, which made apportionment impossible because "the major risk is the biological interaction between the two." (R.B., p. 6-7, *citing* RT, 284 (testimony of Dr. Horn)).

On direct examination, Dr. Horn offered the following testimony on this issue:

> A. . . . The biology of this [synergistic effect] has not been clearly worked out. We don't understand the cellular mechanism of this, but there is no question that this occurs. That is, if you have been exposed to asbestos and you have smoked cigarettes, some interaction occurs between the two in the body and in the lung such that your risk for developing lung cancer, which was high from both, is greatly augmented such that your risk for developing lung cancer is very high.
>
> Q. Now, once you decide that there is a synergistic involvement of the two factors that an individual is exposed to, can you then kind of go backwards and try to figure out what the relative contribution was in causing the lung cancer between the asbestos and the smoking?
>
> A. There is no way to do that.
>
> Q. Why is that?
>
> A. Because the major risk has to do with some biological interaction that occurs between the two, and it's a function of both exposures. It's a function of both the asbestos exposure and it's a function of the

> cigarette smoking. It's the major risk that occurs in individuals who have both exposures has to do with this basic biological principal, some interaction occurs.

(RT, 284:8-285:1).

The plaintiffs' expert Dr. Smith, concurred, in response to a hypothetical question patterned after Gaylord's smoking and asbestos exposure, that his opinion was that "smoking and asbestos probably contributed to causation" (RT, 512:14-15), and that apportionment was impossible because the synergistic effect was the cause of lung cancer in such cases. (RT, 512:23-515:4). In his direct testimony, Dr. Smith explained the apportionment problem as follows:

> Q. Is there any epidemiologic data that's been assembled to try to assess the validity of this kind of apportionment of risk [between smoking and asbestos]?
>
> A. Well, in terms of apportionment of risk you couldn't. This is a biological thing. If these agents are acting jointly in the body, you can't split this mathematical-[*sic*] like that. There is no biological validity, whatsoever, nothing to support.

(RT, 519:12-18).

The plaintiffs' expert Dr. Hammar offered similar direct testimony regarding the nonapportionability of causation in a synergistic effect case:

> Q. So, what happens in the case of somebody who had both occupational exposure to asbestos and a smoking history?
>
> A. Well, if they had a significant smoking history and a significant history of exposure to asbestos, then what I usually say is that I think the cancer was

> caused by the combined effect. This has to do with the lung cancer . . . .
>
> [W]hat I would say, is that giving [*sic*] a person who has a moderate to high exposure to asbestos or a moderate to high concentration of asbestos in their lung tissue and who was a cigarette smoker, I would say that their cancer is caused by the combined effect of both agents. And I would not be able to apportion any part of that tumor to cigarette smoke versus asbestos.
>
> Q. Is this notion of synergy an accepted medical fact as far as you know?
>
> A. As far as I know it was. It was reviewed by a person named Dr. Sarracci in 1987 where he went through all of the studies that had looked at this and his conclusion was that there was this multiplicative synergism acting in people who had moderate to high levels of exposure to asbestos in an occupational setting.

(RT, 616:27-617:21).

Against this overwhelming, consistent expert medical testimony of causation by synergistic effect, the *only* "evidence" that even arguably linked Gaylord's cancer to asbestos alone was Dr. Hammar's general comment that this possibility could have existed if Gaylord had been exposed to "very high levels of asbestos" similar to those of an asbestos insulator or asbestos textile worker. (RT, p. 630:4-17, *cited at* R.B., p. 7, and Opinion, p. 4). Dr. Hammar, however, also testified that Gaylord's cigarette smoking, alone, was sufficient to have caused his cancer (A.R., p. 7, *citing*, RT, 630:20-22), and ultimately concluded that the synergistic effect was the only possible cause of Gaylord's cancer that could be identified with reasonable medical certainty. The special verdicts establish that the jury attrib-

uted Gaylord's cancer to both cigarette smoking and asbestos exposure. Dr. Hammar's general comment that lung cancer can be caused by asbestos alone was clearly not the basis for the jury's causation finding, even if his single comment could be considered as substantial evidence in this case.

b. In the Absence of Any Contrary Expert Testimony on Which the Jury Could Have Relied, the Jury Could Only Have Held that Gaylord's Cancer Was Caused by the Synergistic Effect

As noted in the opinion, the jury rejected BP Chemicals' defense "that causation could be apportioned between asbestos exposure and smoking." (Opinion, p. 11). Because the jury clearly discredited this theory, there was no substantial evidence to support a finding of causation based on smoking and asbestos exposure acting independently. Under the evidence submitted, the jury could not properly have attributed Gaylord's cancer to any cause other than the synergistic effect.

As is commonly recognized in the context of medical malpractice cases, "medical causation can only be determined by expert medical testimony." *Salasquevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal. App.3d 379, 385-86, 271 Cal.Rptr. 780. In cases where asbestos is implicated, the pathology of a plaintiff's cancer requires expert medical testimony to establish even a *prima facie* case for causation. *See, e.g., Money v. Manville Corp. Asbestos Disease Compensation Trust Fund* (Del. 1991) 596 A.2d 1372, 1376-77 (copy attached as exhibit C).

The Pennsylvania Supreme Court recently held, in an asbestos-related cancer case, that a jury lacks authority to make causation findings that contradict consistent expert testimony. *Martin v. Owens-Corning Fiberglass* (Pa. 1987) 528 A.2d 947 (*cited and discussed in Lee v. Pittsburgh*

Corning Corp.) (Pa. Super. 1992) 616 A.2d 1045 (copy attached as exhibit D). Because the consistent expert testimony in *Martin* was that the cause of the plaintiff's lung cancer could not be apportioned between smoking and asbestos, the court held that "any apportionment by the jury . . . was a result of speculation and conjecture, and hence, improper." *Id.*, p. 950. In similar fashion, the court in *Lee v. Pittsburgh Corning Corp., supra*, held that a jury verdict apportioning the cause of the plaintiff's lung cancer could not be sustained where the only expert testimony was that the cancer was caused either solely by asbestos or solely by cigarette smoking. 616 A.2d at 1048.

As discussed, the only expert medical evidence the jury could have credited in the present case was that Gaylord's lung cancer was caused by the synergistic effect of smoking and asbestos exposure. As in the foregoing cases, the jury could not have reached a finding that contradicted the consistent testimony of the plaintiffs' medical experts without resorting to pure speculation. The only possible inference from the special verdict findings is that, consistent with the opinions of all of the plaintiff's medical experts, the jury found that Gaylord's cancer was caused by the synergistic effect of smoking and asbestos exposure. The synergistic effect, therefore, was the adjudicated cause of Gaylord's cancer.[3]

3. Had the Court Recognized the Jury's Finding of Causation by Synergistic Effect, the Failure-to-Warn Judgment Would Have Been Reversed

As the Court noted, a duty to warn only exists with respect to "a particular risk that was known or knowable in light of the generally recognized and prevailing best scien-

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[3] Alternatively, had the jury based its finding on any causation theory other than the synergistic effect, a rehearing should be granted in this matter to vacate the judgment based on jury speculation.

tific and medical knowledge available at the time of manufacture and distribution." (Opinion, p. 6). Had the Court recognized that the jury had necessarily found that Gaylord's cancer was caused by the synergistic effect, the failure-to-warn judgment would have been reversed, in view of the undisputed evidence that the synergistic effect was not known until years after BP chemicals stopped supplying asbestos-containing products to Gaylord's employer.

As was thoroughly discussed in BP Chemicals' briefs, the defendant's duty is to warn in cases involving causation by the synergistic effect of two different substances is of the synergistic effect, provided it was knowable at the pertinent time. (A.B., pp. 32-34; R.B., pp. 11-13, *citing: Skill v. Martinez* (D.N.J. 1991) 91 F.R.D. 498 (synergistic effect of smoking and oral contraceptive use in causing strokes; copy attached as exhibit D); *Barry v. Don Hall Laboratories* (Ore. App. 1982) 642 P.2d 685 (synergistic effect of sugar and Vitamin C in promoting tooth decay; copy attached as exhibit E)). Because the adjudicated cause of Gaylord's cancer was the synergistic effect, a warning of known asbestos hazards, if given, would have been inadequate as a matter of law. *Skill v. Martinez, supra*, 91 F.R.D. at 513-14. As "the law neither does nor requires idle acts," Civ. Code § 3532, the failure-to-warn judgment cannot possibly stand on BP Chemicals' failure to provide warnings of general asbestos health hazards, such as were printed on the boxes in which its asbestos-containing tapewrap was shipped during the latter years of production. The failure-to-warn judgment, therefore, should be reversed.[4]

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[4] Had the Court reversed this judgment, it would have been necessary to consider BP Chemicals' appeal of the design defect claim, and the applicability of the government contractor defense to BP Chemicals' asbestos-containing products. Rather than discuss the defense in detail, BP Chemicals hereby incorporates the arguments previously set forth on this issue. (*See*, A.B., pp. 15-30; R.B., pp. 15-28).

B. The Court Erred in Ruling That Section 998 Authorizes "Partial" Offers to Compromise

BP Chemicals also contends that the Court should have upheld the trial court's order denying the plaintiffs' claim for statutory costs and interest under Code of Civil Procedure section 998. BP Chemicals' sole argument in opposition to the plaintiffs' appeal from this order was that the plaintiffs' offer was not valid under section 998, as the offer only extended to each named defendant's "several liability only, and not for a discharge of any other claim." (A.R., p. 29). In the opinion, the Court acknowledged that the plaintiffs' statutory offer was only to compromise their noneconomic damages claims. (Opinion, p. 14). Under these circumstances, the trial court's order should not have been reversed.

The salutary purpose of section 998 is to encourage pretrial settlements of actions. *Stell v. Jay Hales Development Co.* (1992) 11 Cal.App.4th 1214, 1231, 15 Cal.Rptr.2d 220, *citing, Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 270, 276 Cal. Rptr. 321. An acceptance of the plaintiffs' offer in the present case would not have settled their action, as the plaintiffs' substantial economic damages claims would have remained for trial. In evaluating the plaintiffs' claim for statutory costs and interests, therefore, it is immaterial whether the noneconomic damages awarded exceeded the section 998 offer. Section 998 penalties cannot reasonably be invoked where, as here, acceptance of the offer would not have served the statutory purpose underlying the statute, but would only have funded the plaintiffs' continuing litigation of their action. The denial of the plaintiffs' claim for costs and interest, therefore, was clearly within the trial court's discretion, and the order should not have been disturbed on appeal.

III

CONCLUSION

As discussed, a rehearing of this matter is requested to direct the Court's attention to arguments that may have been overlooked in the July 12, 1994, memorandum opinion. As set forth above, had the Court considered the jury's finding of contributory negligence in its analysis of the failure-to-warn judgment, that judgment would have been reversed. In addition, the Court should not have reversed the trial court's order denying the plaintiffs' claim for costs and interest because their offer was not a valid section 998 offer of judgment. For the foregoing reasons, the Court should grant a rehearing of this matter.

DATED: July 27, 1994 KENNEY, BURD & MARKOWITZ

BY: /s/ TOM K. HAMMITT
Tom K. Hammitt
Attorneys for Defendant and Appellant BP CHEMICALS (HITCO) INC.

PROOF OF SERVICE

I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is Two Embarcadero Center, Suite 740, San Francisco, California 94111.

On July 27, 1994, following ordinary business practices, I placed for collection and mailing at the offices of Kenney, Burd & Markowitz, located at Two Embarcadero Center, Suite 740, San Francisco, California 94111, a copy of the attached **Petition for Rehearing** in a sealed envelope with postage thereon fully prepaid, addressed as follows:

Original +4 copies hand delivered to:

Clerk of the Court of Appeal
303 Second Street, South Tower, 6th Floor
San Francisco, CA 94107

One copy mailed to:

Bryce Anderson, Esq.
Law Offices of Bryce C. Anderson
1985 Bonifacio Street, Suite 102
Concord, CA 94520

I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 27, 1994, at San Francisco, California.

/s/ SHARON PROSSER
Sharon Prosser

APPENDIX 22

1 Civil No. A059183
(S.F. Super. Ct. No. 891562)

IN THE COURT OF APPEAL

OF THE

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

Division Four

ROBERT and JANET GAYLORD,

Plaintiffs, Respondents
and Cross-Appellants,

vs.

B.P. CHEMICALS
(HITCO) INC.,

Defendants, Appellants
and Cross-Respondents

RESPONDENTS' AND CROSS-APPELLANTS' OPPOSITION TO PETITION FOR REHEARING

Appeal from Judgment on Jury Verdict of the Superior Court of the State of California in and for the City and County of San Franciso

Hon. Laurence Kay, Judge

Philip A. Hurley, Esq., S.B.N. 147407
BRAYTON, GISVOLD & HARLEY
999 Grant Avenue
P.O. Box 2109
Novato, CA 94948
Telephone: (415) 898-1555

Bryce C. Anderson, Esq., S.B.N. 47390
LAW OFFICE OF
BRYCE C. ANDERSON
1985 Bonifacio Street
Suite 102
Concord, CA 94520
Telephone: (510) 686-2300

Attorneys for Plaintiffs, Respondents and Cross-Appellants

????? Zandonella Reporting Service, 2321 Stanwell Drive, Concord, CA 94520 Telephone: (510) 685-6222

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1 Civil No. A059183
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IN THE COURT OF APPEAL

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RESPONDENTS' AND CROSS-APPELLANTS' OPPOSITION TO PETITION FOR REHEARING

Appeal from Judgment on Jury Verdict of the Superior Court of the State of California in and for the City and County of San Francisco

Hon. Laurence Kay, Judge

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR:

Plaintiffs, respondents and cross-appellants herewith submit their opposition to the petition for rehearing in the above-entitled matter.

I

INTRODUCTION

Plaintiffs made a very modest settlement offer under Code of Civil Procedure section 998 to defendant BP Chemicals (Hitco) Inc. prior to trial. [J.A. 228-230, Tab 14.] Defendant chose to reject this offer and to take its chances with a jury in this case. The result was an award of damages substantially in excess of the settlement offer made by plaintiffs. [J.A. 385-386, Tab 27.] The trial court, however, erroneously refused to apply the provisions of section 998, thereby relieving the defendant of prejudgment interest and expert witness fees. [J.A. 369, Tab 21.] Rather than accepting this windfall benefit, defendant chose to contest this judgment on appeal. The result is that this Court has affirmed the underlying result reached by the jury but reversed the trial court's ruling on plaintiffs' section 998 offer. Defendant has now filed a petition for rehearing which does nothing more than rehash arguments which had no merit when they were first made and which this Court effectively answered in its Opinion. Plaintiffs submit that the petition for rehearing is completely without merit and should be denied.

II

THE JUDGMENT WAS PROPERLY AFFIRMED ON A THEORY THAT DEFENDANT NEGLIGENTLY FAILED TO WARN PLAINTIFF

Defendant BP Chemicals rehashes in its petition for rehearing the argument previously advanced that the judgment in plaintiffs' favor cannot stand upon a "failure to warn" theory. Defendant's argument is that (1) because Robert Gaylord was held to be comparatively at fault, his lung cancer must have been caused by the synergistic effect of smoking and asbestos exposure; and (2) because the synergistic effect was not known until after his last exposure to defendants' products, defendant could not have known to warn him if this hazard. In making this argument, defendant misconstrues both the nature of the synergistic effect of smoking and asbestos exposure and the nature of plaintiffs' theory of liability.

Defendant cites *Skill v. Martinez* (D.N.J. 1991) 91 F.R.D. 498 and *Barry v. Don Hall Laboratories* (Ore.App. 1982) 642 P.2d 685 for the proposition that plaintiff had to show that defendant knew or should have known of the synergistic effect in order to hold defendant liable on a failure to warn theory. Neither case supports defendant BP Chemicals' contentions. In *Skill* the defendant Ortho Pharmaceutical Co. had warned of the hazards of taking the birth control pill Ortho Novum, but had not warned of the known synergistic effect between smoking and birth control pills on the risk of strokes. *Id.* at 507-508. In *Barry* the defendant vitamin manufacturer produced vitamin C_1 tablets containing sugar, but did not warn of the existence of sugar in its vitamin pill or the known synergistic effect between vitamin C and sugar on the risk of tooth decay. *Id.* at 690-691. In both cases it was only the synergistic effect which presented the alleged defect requiring the warning.

If defendant had warned of the hazards of exposure to respirable asbestos dust, or if such exposure were harmless except when combined with exposure to tobacco smoke, defendant's theory might have some viability. Defendant, however, consistently ignores the fact, repeatedly established by expert testimony, that respirable asbestos dust was at the time of Robert Gaylord's exposure a known potent carcinogen which *by itself* was capable of causing Robert Gaylord's lung cancer. [See, e.g., RT 1426 to 1437 and Ex. 22.] Defendant, as a manufacturer of asbestos products, is held to the standard of an expert regarding the potential hazards from the use of these products. *Vermeulen v. Superior Court* (1988) 204 Cal.App.3d 1192, 1204 [251 Cal.Rptr. 805]. Nevertheless, the testimony was undisputed that defendant could have, but never did warn of these hazards. [RT 1396 to 1398.] Defendant's attempt to bring itself within the holding of *Anderson v. Owens-Corning Fiberglass Corp.* (1991) 53 Cal.3d 987 [281 Cal.Rptr. 528, 810 P.2d 549] is therefore futile.

That Robert Gaylord's lung cancer may[1] have been caused by both cigarette smoking and asbestos exposure also does not exonerate defendant. It is well established in California that a defendant is liable for damages if its tortious conduct was a concurring cause of plaintiff's injury, even though not the sole cause. See generally, 6 Witkin, *Summary of California Law* (9th Ed. 1985) "Torts" § 970 pp. 360-361 and cases cited therein. Defendant does not and cannot contend that cigarette smoking was established as the sole cause of Robert Gaylord's lung cancer, and the jury properly considered the issue of Gaylord's contributory fault in assessing damages. The Court has properly affirmed the judgment on the ground of defendant BP Chemicals' breach

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[1] As the Court has noted, defendant did not ask for findings as to the nature of Robert Gaylord's comparative negligence, and so the basis for its finding cannot actually be determined. [Opinion, p. 6.]

of its duty to warn Robert Gaylord and other users of its products of the hazards of asbestos exposure.

III

THE TRIAL COURT'S RULING REGARDING PLAINTIFFS' OFFER UNDER CODE OF CIVIL PROCEDURE SECTION 998 WAS ERRONEOUS

Defendant states in its petition for rehearing that "In the Opinion, the Court acknowledged that the plaintiffs' statutory offer was only to compromise their noneconomic damages claims." This is a misstatement of the Court's Opinion. The Court actually stated that "the offer to compromise could . . . be read as an offer for only the non-economic damage claims. . . " [Opinion, p. 14.] The Court then correctly noted that this offer, even if read in this "most restrictive manner possible" was less than the recovery made by Janet Gaylord alone, and that her claim was by its very nature entirely non-economic damages. [Id.] Thus, even if plaintiffs' offer were given this extremely strained construction, defendant could have settled Janet Gaylord's entire claim and the non-economic portion of Robert Gaylord's claim for less than Janet Gaylord obtained by the jury verdict after credit for other settlements.

As plaintiffs set forth at length in their reply brief, an offer under Code of Civil Procedure section 998 must be given a normal, reasonable interpretation that takes into account the surrounding circumstances of the parties. See generally, Civil Code sections 1641, 1643 and 1647. Plaintiffs' offer stated, among other things, that "payment of said sum shall release the personal injury and loss of consortium claims against said defendants," and that "[a]cceptance of this offer by any defendant specifically shall constitute agreement that the plaintiffs may continue to proceed against other non-settling tortfeasors . . . ." This language cannot reasonably be interpreted as anything but an offer to

settle both economic and non-economic damages. The trial court's denial of prejudgment interest and expert witness fees was therefore in error, and this Court correctly reversed that order.

IV

CONCLUSION

Defendant BP Chemicals (Hitco) Inc., like many other asbestos defendants, manufactured its products for several years without the slightest concern for the hazards which these products posed to those working with them. These hazards had been documented years before Robert Gaylord began his employment with Kaiser Aerospace in 1956, and the medical literature covering the hazards of asbestos exposure, including the risk of cancer was readily available to defendant. Nevertheless, BP Chemicals chose not to print warnings even on the packages in which its products came. Although defendant's officers and directors are undoubtedly distressed that the company must now pay for its years of misconduct, their distress is nothing compared to the suffering undergone by the Gaylords as Robert Gaylord slowly dies of asbestos-related lung cancer. This Court has correctly upheld the judgment finding defendant liable for the harm it inflicted on the Gaylords.

Defendant's contentions regarding plaintiffs' settlement offer are something less than entirely candid. Having chosen to reject a very modest settlement offer, defendants attempted to seize on a strained construction of that offer in order to avoid the statutory consequences of their decision. Although defendants managed to convince a busy trial judge into committing error on this issue, this Court has properly corrected that error.

For all of the foregoing reasons, the petition for rehearing should be denied.

Dated: August 4, 1994

Respectfully submitted,

BRAYTON, GISVOLD & HARLEY

and

LAW OFFICES OF BRYCE C. ANDERSON

By: /s/ BRYCE C. ANDERSON
Bryce C. Anderson
Attorneys for Plaintiffs, Respondents and Cross-Appellants

PROOF OF SERVICE BY MAIL — CCP 1013A, 2015.5

I declare that I am a resident of, and employed in the County of Contra Costa, State of California. I am over the age of eighteen years, and not a party of the within entitled cause. My business address is 2321 Stanwell Drive, Concord, CA 94520. On August 2, 1994, I served the within **RESPONDENTS' AND CROSS-APPELLANTS' ANSWER TO PETITION FOR REHEARING** on the interested parties in said cause by placing a true and correct copy thereof in a sealed envelope, postage prepaid, in the United States mail at Concord, California, addressed as follows:

Tom K. Hammitt, Esq.
KENNEY, BURD,
KNUTSON &
MARKOWITZ
4 Embarcadero Center
Suite 2500
San Francisco, CA 94111

Phillip A. Harley, Esq.
BRAYTON, GISVOLD &
HARLEY
999 Grant Avenue
P.O. Box 2109
Novato, CA 94948

Clerk, Superior Court
City Hall
400 Van Ness Avenue
Room 317
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed August 2, 1994, at Concord, California.

/s/ ANNA M. ZANDONELLA
Anna M. Zandonella

APPENDIX 23

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION: 4

GAYLORD, ROBERT ET AL

vs.

BP CHEMICALS (HITCO) INC.

A059183
San Francisco County No. 891562

By the Court:

The petition for a rehearing is denied.

Dated: August 8, 1994

/s/ P.J. ANDERSON
P.J. Anderson

Kenney, Burd & Markowitz
Kenney, Stephen C.
2 Embarcadero Ctr.
Suite 740
San Francisco, CA 94111

A059183

APPENDIX 24

Case Number: _____

IN THE
SUPREME COURT OF CALIFORNIA

ROBERT and JANET GAYLORD,

Plaintiffs, Respondents,
Cross-Appellants,

v.

BP CHEMICALS (HITCO) INC.,

Defendant, Appellant
Cross-Respondent.

San Francisco Superior Court
Action No: 891562
Trial Judge: The Honorable
Laurence D. Kay

After a Decision by the Court of Appeal
First Appellate District, Division Four
[Case No. A0 59283]

PETITION FOR REVIEW

STEPHEN C. KENNEY, ESQ. (State Bar No: 053883)
TOM K. HAMMIT, ESQ. (State Bar No: 145852)
KENNEY, BURD & MARKOWITZ
Two Embarcadero Center, Suite 740
San Francisco, California 94111
Telephone: (415) 397-3100

Attorneys for Appellant and Cross-Respondent
BP CHEMICALS (HITCO) INC.

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ISSUES PRESENTED

1. Whether, after *Boyle v. United Technologies, Inc.* (1988) 487 U.S. 500, state law tort actions alleging design defects against sellers of asbestos-containing materials used in military equipment (strategic guided missiles) are pre-empted by the federal common-law "government contractor defense."

2. Whether, in multiple-exposure toxic tort actions where the victim's injury is caused by a "synergistic effect" between different exposures that creates a risk of injury far greater than the sum of the risks in simple combination, the synergistic effect should be recognized as the distinct legal cause of the injury.

3. Whether cost penalties can be invoked under Code of Civil Procedure section 998 in personal injury actions where the pretrial offer of judgement only extended to a plaintiff's noneconomic damages claims.

THE NATURE OF THE CASE AND PROCEDURAL HISTORY

A. The Underlying Action

1. The Parties

The underlying action arises from lung cancer that plaintiff Robert Gaylord ("Gaylord") allegedly developed in connection with exposure to asbestos-containing products through his employment at Kaiser Aerospace ("Kaiser") in San Leandro from 1956 until 1987. (Court of Appeal's Memorandum Opinion ("Opinion"), p.1). Gaylord worked as a tracer lathe machinist finishing parts for the nosecones and rocket motors of Minuteman, Advanced Minuteman, Pershing and Polaris missiles that Kaiser constructed under contracts with the United States government or with prime

contractors. (Opinion, pp. 1-2; RT, 360:9-361;21, 1293;26 1294:19-26).

U.S. Polymeric, a predecessor in interest to petitione BP Chemicals (HITCO) Inc. ("BP Chemicals"), subcon tracted with Kaiser to supply preimpregnated tapewrap required by Kaiser's government contracts for use in con structing ablative liners in the rocket motors used in severa missile programs.[1] U.S. Polymeric's tapewrap was used in the Advanced Minuteman, SRAM, SRM-I, SRM-II, Pola ris, Poseidon and Trident missile programs at Kaiser Among the different types of tapewraps supplied by U.S Polymeric, two contained asbestos, and were used in the rocket motors employed in the second stages of the Polaris A3 and Poseidon missiles. In every case, the specific type o tapewrap to be used in a missile program was mandated by the government contracts involved.

In 1977, after learning of asbestos health hazards U.S. Polymeric began printing warnings on the boxes in which the asbestos-containing tapewrap was delivered to Kaiser (warnings could not be printed on the tapewrap directly). At the same time, U.S. Polymeric stopped supply ing asbestos-containing tapewrap, except as required to do so by federal law under existing missile program contracts.

2. The Plaintiff's Lung Cancer

Gaylord is a victim of lung cancer who underwent a lobectomy in 1990. He is a former cigarette smoker who

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[1] U.S. Polymeric's preimpregnated tapewrap consisted of fabric o tape material made from silica, carbon fiber, graphite or asbestos, which was impregnated with heat-resistant phenolic resin. (RT, 1570:10 1572:24). Ablative liners are used in rocket motors to protect the moto structure from heat. "Ablation" is a process in which the liner materials combine with, and are eroded away by, the hot gases associated with thrust generation, thereby protecting the underlying structure from damage. (RT, 1567:26-1569:7).

consumed an average of one-half to three-quarters of a pack of cigarettes daily for 34 years, and smoked as much as two packs per day during some periods. (RT, 288:5-21, 300:26-27, 383:25-384:2).

Although Gaylord was given a high-resolution CT scan (1989) and a bronchoscopy (1988), and underwent the lobectomy, neither the CT film nor the removed lung tissue revealed any physical evidence specific to asbestos exposure. (RT, 889:13-893:16 (CT film), 696:12-697:5 (bronchoscopy tissue), 692:27-693:12 (lobectomy tissue)). None of his treating physicians diagnosed Gaylord's cancer as asbestos-related. (RT, 975:10-976:3). The plaintiffs' medical experts' opinions that Gaylord had suffered asbestos exposure were, instead, based solely on Gaylord's occupational history at Kaiser, where asbestos-containing materials were used in some of the missile programs.

3. The "Synergistic Effect" Theory of Lung Cancer Causation

The plaintiffs' theory of causation at trial, as supported by the consistent testimony of their medical experts, was that Gaylord's cancer was caused by the "synergistic effect" of smoking and asbestos exposure. (RT, 296:26-297:6 (Dr. Barry Horn); RT, 51:13-52:22 (Dr. Allan Smith); RT, 617:1-13 (Dr. Samuel Hammar)). This "synergistic effect" results from a biochemical interaction through which exposures to cigarette smoke and asbestos automatically combine in the lungs in a manner that multiplies the risk of cancer enormously above the sum of the risks caused by each of the exposures independently. (RT, 280:17-281:19).

According to the plaintiffs' experts, there is no minimum threshold asbestos exposure below which the synergistic effect does not operate; hence, as in Gaylord's case, the theory creates strict liability for asbestos suppliers in lung cancer cases based on a plaintiff's smoking, combined with

alleged asbestos exposures too slight to be physically detected. (RT, 299:3-8).

The plaintiffs' experts agreed that, in cases involving lung cancer victims with histories of smoking and asbestos exposure, it is impossible to apportion causation because the cause of the cancer is the synergistic effect, not smoking and asbestos independently or in simple combination. (RT, 284:8-285:1). The existence of this synergistic effect was first indicated in the 1977-80 time frame, through epidemiological studies of asbestos workers. (RT, 1538:12-28).

B. The Trial and the Jury's Special Verdicts

The trial of this action was consolidated with one other asbestos personal injury action, and was bifurcated between the issues of medical causation and damages (Phase I), and the issues of liability and Gaylord's contributory negligence (Phase II). (Opinion, p. 2). At the end of Phase I, the jury returned a special verdict that asbestos was a cause of Gaylord's cancer, and that causation could not be apportioned between asbestos and cigarette smoking. At the end of Phase II, the jury returned a special verdict apportioning a 25 percent liability share to BP Chemicals, and 10 percent to Gaylord, based upon a specific finding that he was contributorily negligent for smoking.[2] In sum, the jury found that smoking and asbestos, acting together, had caused Gaylord's cancer, and that causation could not be apportioned between these two exposures. BP Chemicals' liability for damages totals $981,159, plus costs and substantial interest.[3]

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[2] Before submitting the case to the jury, the court struck the government contractor defense based on a finding that U.S. Polymeric's tapewrap was an "off-the-shelf" product. (RT, p. 1661:12-17).

[3] The special verdict forms are included at Tab 8 of the Joint Appendix in this matter.

After the trial, the court denied the plaintiffs' motion for costs pursuant to their pretrial section 998 offer on the basis that the offer was "illusory." The reason for the court's ruling was that the express terms of the offer were only for "compromise of [BP Chemicals'] several liability only . . . and not for a discharge of any other claim." Had BP Chemicals accepted the offer, the issues of economic damages, and overall liability, would have been left for trial.

C. The Court of Appeal's Opinion

BP Chemicals' principal contentions before the Court of Appeal were that the government contractor defense preempted the plaintiffs' design defect claim (Appellant's Brief ("A.B."), pp. 15-30), and that the failure-to-warn verdict was insupportable, as the synergistic effect of smoking and asbestos that the jury found had caused Gaylord's cancer was unknown until after U.S. Polymeric stopped supplying asbestos-containing products. (A.B., pp. 30-37). BP Chemicals argued that these defects required that the jury verdict be reversed and the action remanded for a new trial. (A.B., pp. 30, 34). To show that the jury had necessarily attributed causation to the synergistic effect, BP Chemicals relied on the finding that Gaylord was contributorily negligent for smoking, the uniform testimony of the medical experts that apportionment was impossible because the cause of Gaylord's cancer was the synergistic effect, and the special verdict that causation could not be apportioned between asbestos and smoking.

The Court of Appeal affirmed the judgment, based on a ruling that BP Chemicals had breached a duty to warn of generally known asbestos health hazards. In the memorandum opinion (copy attached as exhibit A), the Court of Appeal did not address the government contractor defense, except to explain that the defense did not generally apply to

failure-to-warn claims, which BP Chemicals had never contested. (Opinion, p. 6).

With respect to BP Chemical's argument that the only relevant duty to warn in this action is of the synergistic effect of smoking and asbestos exposure — the adjudicated cause of Gaylord's cancer — the Court of Appeals stated that "the jury did not make a finding that Gaylord was injured by the synergistic effect of cigarette smoke and asbestos fibers. The theory was certainly argued to it, but no such finding was made." (Opinion, p. 6). In reaching this conclusion, however, the Court of Appeals' did not even mention, leave alone consider, the contributory negligence verdict on which BP Chemicals has relied to show that the jury had attributed causation to the synergistic effect. (*See*, Opinion, p. 2-3 (discussion special verdicts)).

The plaintiffs cross-appealed from the trial court's denial of their section 998 costs claim. The Court of Appeal expressly approved the trial judge's interpretation of the section 998 offer as extending only to the noneconomic damages claims. (Opinion, p. 14). The Court of Appeal, however, reversed the order on the basis that the noneconomic portion of the plaintiffs' damages award exceeded the pretrial offer. (*Id.*). Subsequently, the Court of Appeal denied BP Chemical's petition for a rehearing on the foregoing issues.

WHY REVIEW SHOULD BE GRANTED

ISSUE NUMBER ONE: Whether, after *Boyle v. United Technologies, Inc.* (1986) 487 U.S 500, state law tort actions alleging design defects against sellers of asbestos-containing materials used in military equipment are pre-empted by federal common law. The Court has previously granted review of this issue in at least one action, which apparently was dismissed before final decision. (*See,* order dated February 16, 1989, granting review in *Raymark In-*

dustries, Inc. v. Superior Court of the County of Alameda, Glenda Bartee, Real Party in Interest, No. S008321).

Asbestos products liability actions involving employees of government aerospace and military contractors are proliferating in California due to the state's extensive involvement in these industries, and the latency period of 10 to 30 or more years associated with asbestos-related disease. In 1989, when the Court ordered review of the *Raymark Industries* case, more than 7,000 military- or aerospace-related asbestos products liability actions were believed to be pending.

The application of the government contractor defense to asbestos products liability actions is an issue of first impression in California. Although the issue has been addressed in asbestos products liability actions in several jurisdictions, almost all of the cased involve shipyard liability, and the holdings are inconsistent.[4]

The Court has not addressed the *Boyle* government contractor defense in any located decision, nor do the reported decisions of the Court of Appeal indicate whether, and to what extent, the defense should apply in asbestos products liability actions. In light of the great significance of this defense in asbestos products liability actions against California aerospace and defense contractors, and the need for a just and predictable application of the law in this area, this issue presents an important unresolved legal question that merits review.

ISSUE NUMBER TWO: Whether, in multiple-exposure toxic tort actions where the victim's injury is caused

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[4] *Compare, In re Brooklyn Naval Yard Asbestos Litigation* (2d Cir. 1992) 971 F.2d 831, 839, and *Dorse v. Armstrong World Industries, Inc.* (Fla. 1987) 512 So.2d 1265 (defense applicable), *with, In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 812 (defense inapplicable).

by a "synergistic effect" between different exposures that creates a risk of injury far greater than the sum of the risks in simple combination, the synergistic effect should be recognized as the distinct legal cause of the injury. Other jurisdictions have uniformly recognized synergistic effects as distinct legal causes, with important consequences in the area of failure-to-warn claims.[5] As in the present case, the synergistic carcinogenic effect of cigarette smoking and asbestos exposure has been the adjudicated cause of lung cancer in several reported decisions, none of which, however, reached the failure-to-warn issue.[6]

The synergistic effect theory provides a foundation for holding sellers of asbestos-containing products strictly liable in lung cancer actions based on alleged asbestos exposures too tenuous to be physically detected, provided only that the victim smoked cigarettes. Sellers of asbestos-containing products, or sellers of any products that potentially cause synergistic effects, can be held liable even though the plaintiff's injury would not have occurred but for the synergistic effect between the seller's products and the plaintiff's other exposures. In appropriate cases, therefore, the synergistic effect should be held to comprise a distinct legal cause, with a distinct predicate duty to warn.

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[5] *See, e.g.: Skill v. Martinez* (D.N.J. 1981) 91 F.R.D. 498 (synergistic effect of smoking and oral contraceptive use in causing strokes); *Barry v. Don Hall Laboratories* (Ore. App. 1982) 642 P.2d 685 (synergistic effect of sugar and vitamin C in causing tooth decay); *Batteast v. Wyeth Laboratories, Inc.* (Ill. 1990) 560 N.E.2d 315, 317, 321-23 (synergistic effect of medications in causing brain damage).

[6] *See, e.g.: Borman v. Raymark Industries, Inc.* (3d Cir. 1992) 960 F.2d 327, 330; *Rogers v. Raymark Industries, Inc.* (9th Cir. 1991) 922 F.2d 1426, 1428; *Ingram v. ACANDS, Inc.* (9th Cir. 1992) 977 F.2d 1332, 1342; *Altiere v. Fibreboard Corp.* (Pa. 1992) 617 A.2d 1302, 1304-05; *Larson v. Johns-Manville Sales Corp.* (Mich. 1986) 399 N.W.2d 1, 4.

ISSUE NUMER THREE: Whether cost penalties can be invoked under Code of Civil Procedure section 998 in personal injury actions where the pretrial offer of judgment only extended to a plaintiff's noneconomic damages, leaving for trial economic damages and liability issues. The trial-avoidance purpose of section 998 is derogated invoking costs penalties for rejected section 998 offers that, if accepted, would not have terminated the plaintiff's action. Applying section 998 in this manner only encourages trials by requiring defendants to bankroll litigation through payment of offers of "judgments" that do not conclude a plaintiff's action, or else risk incurring the statutory penalties.

LEGAL DISCUSSION

I.

State Law Tort Actions Alleging Design Defects Against Sellers of Asbestos-Containing Materials Used in Military Equipment Are Preempted by the Government Contractor Defense

Where its conditions are met, the *Boyle* "government contractor defense" preempts the operation of state products liability laws in design defect claims against government contractors and subcontractors. *Boyle*, 487 U.S. at 512; *Lewis v. Babcock Industries, Inc.* (2d Cir. 1993) 985 F.2d 83, 85, (defense applied to subcontractor).

To qualify for the protection under *Boyle*, the defendant contractor must show that a "uniquely federal interest" exists in its performance under a federal procurement contract, *Boyle*, 487 U.S. at 505, and that this interest is in "significant conflict" with the contractor's duty to provide products that are deemed safe under state products liability laws. *Boyle*, 487 U.S. at 507.

In *Boyle*, the U.S. Supreme Court found that the government's procurement of "military" products was an

area of uniquely federal interest that, in appropriate cases, should be recognized as significantly conflicting with the operation of state tort law in products liability actions against contractors. *Boyle*, 487 U.S. at 511. In that case, involving a death allegedly caused by the defective design of a military helicopter, the Court found that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function" because it involves "judgments as to the balancing of many technical, military, and even social consideration, including specifically the trade-off between greater safety and greater combat effectiveness." *Id.* at 511-12. The present case, which arises from the military procurement of strategic guided missiles, involves the same, uniquely federal interest the U.S. Supreme Court found worthy of protection in *Boyle*.

To determine when the uniquely federal interest in military procurement "significantly conflicts" with the application of state products liability law in an action against a contractor, the U.S. Supreme Court adopted the following three-pronged test:

> (a) the government must have approved "reasonably precise specifications" for the design of the product at issue;
>
> (b) the product, as manufactured, must have "conformed to those specifications;" and
>
> (c) the supplier must have warned the government about any dangers in the use of the product "that were known to the supplier but not to the United States."

Boyle, 487 U.S. at 512. BP Chemicals' appellate briefs in this action fully support each prong of this test. As discussed therein, the evidence is uncontroverted that: (a) before approving the designs of the missiles in which U.S. Poly-

meric's tapewrap was used, the government conducted detailed design reviews, which included meetings with materials suppliers such as U.S. Polymeric to determine whether new, improved materials could be developed or if previously developed products should be used, and U.S. Polymeric's contracts with Kaiser required the company to continue producing asbestos-containing materials even after it terminated its asbestos-containing product lines; (b) military personnel were stationed at Kaiser to conduct acceptance inspections of missile parts and materials, to ensure conformity with the government-approved designs; and (c) the government's knowledge of asbestos health hazards was far superior to U.S. Polymeric's negating the duty to warn. (A.B, pp. 15-30; Appellant's Reply ("A.R"), pp. 15-27).

A split of authority exists over whether the government contractor defense applies in cases arising from military procurement of equipment constructed in part with asbestos-containing materials. In *In re Brooklyn Naval Yard Asbestos Litigation* (2d Cir. 1992) 971 F.2d 831, 839, and *Dorse v. Armstrong World Industries, Inc.* (Fla. 1987) 512 So.2d 1265, the defense was held to preempt design defect claims in the shipyard asbestos context. By contrast, in *In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 812, the defense was held inapplicable on the basis that the shipyard asbestos products involved were not "military." In *Niemann v. McDonnell Douglas Corp.* (S.D. Ill. 1989) 721 F. Supp. 1019, a case more analogous to the present action, the court granted summary judgment for the defendant in an action for wrongful death caused by exposure to asbestos contained in "rub strips" used in several military aircraft designs. *Id.* at 1021-22.

The application of the government contractor defense in favor of aerospace and military contractors involved in asbestos products liability actions is consistent with the

reasoning of the two California Court of Appeal decisions that have directly addressed the government contractor defense, although the different contexts.

In *Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1319, 273 Cal.Rptr. 214, the First District held that the government contractor defense preempted design defect claims based on the inclusion of toluene in paint used on military ships, provided that the paint was "produced according to military specifications and used by the military because of particular qualities which served a military purpose." In a case preceding *Boyle, McLaughlin v. Sikorsky Aircraft* (1983) 148 Cal.App.3d 203, 207, 195 Cal.Rptr. 764, the Fourth District held that the manufacturer of a military helicopter was entitled to assert the government contractor defense in a design defect action related to the use of a nonredundant bolt/nut/cotter-pin fastener in the flight control system that apparently separated, causing the helicopter to crash. The possibility that the government contractor defense applies in asbestos products liability cases was indicated by the First District in *Vermuelen v. Superior Court (Armstrong World Industries, Inc.)* (1988) 204 Cal.App.3d 1192, 1201, 251 Cal.Rptr. 805 (holding evidence of government specifications admissible in Alameda County complex asbestos litigation), but the ruling in that case was avowedly "general" due to the insufficient factual development of the trial court record. *Id.*, pp. 1196, 1201.

The application of the *Boyle* government contractor defense in asbestos products liability actions against aerospace and military contractors is an important question of first impression under California law. Aside from the federal district court decision in the *Niemann v. McDonnell Douglas* case, this issue has not been addressed in a reported decision from any jurisdiction. The government contractor defense is at issue in a great many asbestos products liability

cases in California. The Court should take this important issue under review.

II

A Distinct Legal Cause, and Corresponding Duty to Warn, Should Be Recognized in "Synergistic Effect" Cases in Which the Biochemical Reactions Between Different Exposures Elevate the Risk of Injury Enormously Above the Sum of the Risks From the Exposures Separately

"Knowledge, actual or constructive" of the particular hazard causing a plaintiff's injury "is a requisite for strict liability for failure to warn." *Anderson v. Owens-Corning Fiberglass Corp.* (1991) 53 Cal.3d 987, 1000. The duty to warn exists with respect to the "particular" risk causing a plaintiff's injury. *Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc.* (1990) 221 Cal.App.3d 1601, 1622, 271 Cal.Rptr. 596.

In cases involving injuries caused by the synergistic effects of different exposures, the particular duty to warn is of the risk created by the synergistic effect, not the risk created by either exposure alone. In *Skill v. Martinez* (D.N.J. 1981) 91 F.R.D. 498, 508-09, involving a stroke that was allegedly caused by the synergistic effect of smoking and oral contraceptive use, the court ruled that failure-to-warn liability against the involved pharmaceutical manufacturer could only be established if contemporary medical studies had established the "link between smoking, the pill and strokes." *Id.* at 508-09. In *Barry v. Don Hall Laboratories* (Ore.App. 1982) 642 P.2d 685, 689, involving the synergistic effects in promoting tooth decay of ascorbic acid (vitamin C) combined with sugar, the court ruled that failure-to-warn liability would only exist if the synergistic effect was known at the time the defendant sold sugar-coated vitamins. In *Batteast v. Wyeth Laboratories, Inc.*

(Ill. 1990) 560 N.E.2d 315, 317, 321-23 the Illinois Supreme Court remanded an action involving the synergistic effect of two medications in causing brain damage to receive evidence on the plaintiff's related failure-to-warn claim, as well as other issues.

As in the foregoing cases, the "crux of this case," *Skill v. Martinez, supra.*, 91 F.R.D. at 513, concerns the duty to warn of the synergistic carcinogenic effect of smoking and asbestos exposure, not the risks of asbestos exposure alone. Because this synergistic effect was not discovered until after U.S. Polymeric terminated its asbestos-containing product lines, BP Chemicals should not be held to have breached a pertinent duty to warn.

As discussed, the synergistic effect of smoking and asbestos exposure has been adjudicated cause of lung cancer in numerous reported decisions (*see*, fn. 6, *supra*). The jury in the present action, too, attributed causation to the synergistic effect, as evidenced by the special verdicts that Gaylord was contributorily negligent for smoking, and that the causation of his cancer could not be apportioned between smoking and asbestos exposure. Based on the evidence submitted, had the jury not identified the cause of Gaylord's cancer as the synergistic effect, it could not have attributed causation at all.

The unanimous view of the plaintiff's medical experts was that the reason apportionment was impossible was because the synergistic effect was the cause of Gaylord's cancer. The jury was required to accept this evidence in order to find that the plaintiffs had even established a *prima facie* case for causation. *Salasquevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379, 385-86, 271 Cal.Rptr. 780; *see, Money v. Manville Corp. Asbestos Disease Compensation Trust Fund* (Del. 1991) 596 A.2d 1372, 1376-77 (expert medical testimony mandatory to establish *prima facie* case for causation of cancer by asbestos). In an

analogous context, the Pennsylvania Supreme Court has held that, where the consistent expert testimony in an asbestos products liability action is that the cause of a plaintiff's asbestos-related disease cannot be apportioned between smoking and asbestos, any contradictory jury finding is the "result of speculation and conjecture, and hence, improper." *Martin v. Owens-Corning Fiberglass* (Pa. 1987) 528 A.2d 947, 950; *see, also, Lee v. Pittsburgh Corning Corp.* (Pa. Super. 1992) 616 A.2d 1045, 1048 (vacating jury's apportionment finding as inconsistent with expert testimony that plaintiff's lung cancer was caused either solely by asbestos or solely by cigarette smoking). Had the jury not adopted the synergistic effect theory, it would have lacked any evidentiary basis for finding causation at all.

Even the plaintiffs admit that the jury's causation finding was necessarily based on the "expert testimony regarding the synergistic effects of cigarette smoking and asbestos exposure." (Respondent's Brief, p. 12). The particular duty to warn in this action, therefore, was of the synergistic effect, which was unknown until after U.S. Polymeric terminated its asbestos-containing products lines.[7]

The issue of whether the synergistic effect of different exposures should, in appropriate cases, be recognized as a distinct cause of harm, creating a distinct duty to warn, is an issue of first impression in California. This issue is of great importance in asbestos products liability actions against

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[7] In affirming the failure-to-warn verdict, the Court of Appeal also observed that "the risk to which Gaylord was exposed was lung cancer." (Opinion, p. 6). This observation, however, does not distinguish the present action from either *Skill v. Martinez,* which involved smoking and oral contraceptives, both of which can create the risk of strokes, or *Barry v. Don Hall Laboratories,* which involved sugar and vitamin C, both of which cause tooth decay. As discussed, in both of these cases, the courts ruled that the dispositive issue involved specific warnings of the synergistic effects.

government aerospace and military defense contractors, as well as more broadly, in other cases involving causation by synergistic effects. As discussed, the synergistic effect theory creates strict liability against asbestos defendants in lung cancer cases where the plaintiff's smoking history allegedly combined with asbestos exposures too tenuous to be clinically detected. The Court should take this important issue under review, as well.

III.

Cost Penalties Under Code of Civil Procedure Section 998 Should Not Be Invoked When the Pretrial Offer of Judgment Would Not Have Settled the Plaintiff's Action

BP Chemicals' sole argument in opposition to the plaintiffs' appeal from the trial court's order denying their section 998 costs-and-interest claim was that the pretrial offer was invalid. (A.R., pp. 28-30). The offer was invalid because it was only to "compromise [BP Chemicals'] several liability only . . . and not for a discharge of any other claim." (A.R., p. 29). In the memorandum opinion, the Court of Appeal acknowledged that the offer was limited to the plaintiffs' noneconomic damages claims, and, if accepted, would have left economic damages and liability to be determined at trial. (Opinion, p. 14).

Section 998 exists to encourage pretrial settlements of actions. *Stell v. Jay Hales Development Co.* (1992) 11 Cal.App.4th 1214, 1231, 15 Cal.Rptr.2d 220, *citing, Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 270, 276 Cal.Rptr. 321. Section 998 penalties, therefore, should not be invoked unless the rejected offer was for a compromise of the entire action against the offeree defendant. Had BP Chemicals accepted the plaintiffs' offer, it would have been in the untenable position of sponsoring the continuance of litigation against it. The denial of the plaintiffs' claim for costs and interest was clearly within the trial

court's discretion, and the order should not have been disturbed on appeal. The Supreme Court should grant review of this issue to clarify the appropriate use of section 998 penalties.

CONCLUSION

For the foregoing reasons, and to facilitate the just and predictable application of the law to the important questions addressed above, the Court should grant BP Chemicals' petition for review.

DATED: August 22, 1994

KENNY, BURD & MARKOWITZ

By: /s/ TOM K. HAMMITT

Stephen C. Kenney
Tom K. Hammitt
Attorneys for Defendant,
Appellant and Cross-Respondent
BP CHEMICALS (HITCO) INC.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ROBERT GAYLORD et al.,

Plaintiffs, Cross Appellants, and Respondents,

v.

BP CHEMICALS (HITCO), INC.,

Defendant, Cross-Respondent and Appellant.

Defendant, BP Chemicals (Hitco), Inc. (hereafter BP Chemicals), appeals from a judgment in favor of plaintiffs, Robert Gaylord (Gaylord) and Janet Gaylord, in an action for personal injuries stemming from Gaylord's workplace exposure to asbestos. Plaintiffs likewise appeal from an order denying them prejudgment interest and expert witness fees under Code of Civil Procedure section 998.[1]

FACTS

Gaylord went to work for Kaiser Aerospace in 1956 as a machinist. Between that time and 1987 when he was forced by ill health to stop working he spent much of his career operating a tracer lathe which finished missile parts. The parts which came to him until the early 1980's for finishing were covered with an ablative tape which contained asbestos. The asbestos in the tape acted to shield the nose cones and rocket nozzles from the high temperatures which occurred during firing and flight. Some of the asbestos tape

[1] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

used by Kaiser Aerospace was supplied by U.S. Polymeric, a predecessor to BP Chemicals.

In the area in which Gaylord worked up to 35 lathes might be operating at one time. The finishing process released large quantities of asbestos-laden dust into the air. During the entire period of his employment at Kaiser, Gaylord was a smoker who smoked on average half a pack a day.

In 1987 Gaylord had a chest x-ray which revealed what was eventually diagnosed as being lung cancer. Although he was initially treated with radiation therapy, a recurrence of the disease in 1990 required surgery. A portion of his lung tissue was removed at the time of the surgery and subjected to examination by a pathologist.

Gaylord's claim was consolidated for trial with that of another asbestos plaintiff. The trial was bifurcated and the first phase of the trial dealt with the issues of medical causation and damages. After the first phase the jury returned a special verdict finding that Gaylord's injury was caused by asbestos exposure and that it could not apportion his injury between his smoking and his asbestos exposure. It awarded Gaylord $5,000 for future medical monitoring, $234,000 for medical damages, $865,000 for lost wages and earning capacity and $200,000 in non-economic loss. Janet Gaylord was awarded $200,000 on her loss of consortium claim.

Phase two of the trial addressed the questions of defendant's liability and Gaylord's contributory negligence. At its conclusion the jury returned special verdicts finding that defendant's tape was defective in design, that the company had failed to provide adequate warnings, that Gaylord was exposed to asbestos contained in defendant's tape and his exposure was a legal cause of his injury. Finally,

the jury appointed defendant's fault at 25 percent of Gaylord's injury.

APPEAL

Discussion

On appeal defendant raises several claims of error. It argues that there is no substantial evidence to support the finding that Gaylord's injury resulted from exposure to its products or the finding that it breached its duty to warn. Defendant also argues that the court erred as a matter of law by ruling that the government contractor defense was inapplicable and by bifurcating the trial. Lastly, defendant maintains that the damages awarded to Gaylord for future medical expenses are excessive.

1. Substantial Evidence Claims

In reviewing defendant's claim that there is no substantial evidence to support certain findings this court must resolve all conflicts in favor of the Gaylords and accord their verdict the benefit of every reasonable inference. (*Hasson v. Ford Motor Co.*(1977) 19 Cal.3d 530, 544.)

Defendant argues that first, there was no substantial evidence that asbestos, rather than smoking, was the cause of Gaylord's cancer, and second, that its asbestos containing products formed only a small portion of the asbestos to which Gaylord was exposed.

There was ample evidence before the jury that Gaylord had been a smoker for over 30 years and had smoked at least half a pack of cigarettes a day until he became ill with what was eventually diagnosed as lung cancer. Although one expert (Morgan) testified that Gaylord's exposure to asbestos was not a substantial factor in causing his lung cancer and another (Hammar) that a pathological exam of the removed portions of Gaylord's lung tissue did not permit a

diagnosis of asbestosis, there was also expert testimony (Hammar) that the type of cancer from which Gaylord suffered is associated with exposure either to cigarette smoking or to asbestos. Moreover, there was expert testimony (Hammar) that a high level of asbestos exposure alone would have been sufficient to have caused Gaylord's lung cancer. Another expert (Smith) testified that even a relatively brief exposure to asbestos was sufficient to substantially elevate the risk of eventually contracting cancer.

Defendant also maintains that even if asbestos caused Gaylord's lung cancer the asbestos containing products it supplied to his employer would have been only a very small portion of the asbestos to which he was exposed. It was undisputed that Gaylord worked as a lathe operator to varying extents on the Advanced Minuteman, Pershing and Polaris missile systems. Defendant points to Gaylord's testimony that he had machined 80-90 percent of the Advanced Minuteman parts and points out that it did not supply asbestos tape for that missile program, only for the Polaris and Poseidon programs. There was also evidence, however, that Gaylord's employer was a major customer for defendant during certain periods in the 1960's and 1970's. Due to the passage of time it was no longer possible to quantify the amount of asbestos containing products defendant supplied to the Company prior to 1969. Defendant was, however, the sole supplier to the company of the asbestos tape used on Poseidon nose cones.

There was ample testimony that the area in which Gaylord worked side by side with up to 35 other lathe operators was filled with dust from the machining process. Various vacuum systems were installed by the company to remove the dust, but it was not until 1982 that respirators were supplied to the lathe operators.

There was more than enough evidence to support the jury's finding that Gaylord was exposed to the asbestos

containing products manufactured by defendant and that asbestos was a substantial factor in causing his lung cancer.

Defendant also asserts that there was no substantial evidence to support the jury's finding that it had breached its duty to warn of the risks associated with use of its ablative tape. Defendant maintains that "the evidence was undisputed that [it] did not know, nor could it have known, of the specific hazard that caused Mr. Gaylord's lung cancer. The jury found that this hazard was the combined, synergistic effect of cigarette smoking and asbestos exposure . . . ." Defendant argues that the synergistic effect was not widely known until the late 1970's after it had stopped using asbestos in its products.

As an initial matter the jury did not make a finding that Gaylord was injured by the synergistic effect of cigarette smoke and asbestos fibers. The theory was certainly argued to it, but no such finding was made. Even if it had made such a finding, the risk to which Gaylord was exposed was lung cancer. There was testimony establishing that the link between lung cancer and asbestos exposure was widely known in the early 1950's. Accordingly, one witness testified that some asbestos products carried warnings by the mid-1960's, and by the early 1970's "six or eight of the major manufacturers" put "warnings about the dust hazard on their products."

In order for a plaintiff such as Gaylord to recover under a strict liability theory for failure to warn he need only show "that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002.)

It was undisputed that defendant did not supply any warnings on its products until 1972 or 1973. Likewise, defendant conceded that it knew that the lathing process created dust. There was sufficient evidence from which the jury could infer that defendant knew asbestos exposure put workers at increased risk for lung cancer and that it should therefore have provided warnings that inhaling the dust while lathing parts covered with its ablative tape was a hazard.

Defendant also argues that, in any event it would have been to no avail for it to have included warnings in literature supplied with the tape because in Gaylord's case once the tape was received at the company it was removed from its packaging by another department, applied to the nose cones and autoclaved before Gaylord ever saw it. Thus, defendant contends any warnings included on the packaging would not have come to Gaylord's attention even if it had provided such warnings.

Arguing that a manufacturer has no duty to warn where a warning could not reduce the risk of harm, defendant relies on *Rosburg v. Minnesota Mining & Mfg. Co.* (1986) 181 Cal.App.3d 726, 734-735. In *Rosburg* the plaintiff argued that the maker of a breast implant had a duty in the years following her implant to warn physicians that many of its implants had begun to spontaneously deflate. (*Id.* at p. 734.) the trial court rejected that argument first because it found the warnings given at the time of the surgery sufficiently cautioned that the long term use of the implants was not guaranteed, and second, because it found that the physician knew at the time of the surgery that there was a risk of spontaneous deflation. (*Id.* at p. 735.) Accordingly, the court found that "no harm could have been caused by failure to warn of risk already known. [Citation.]" (*Ibid.*)

This is not a case in which there was a warning given, but plaintiffs have attacked it as inadequate either in

describing the risk or not being designed to reach the intended user of the product. Gaylord testified that it was only in the 1970's that he learned that asbestos posed a health risk. Defendant can scarcely maintain that it had no obligation to provide warnings about its asbestos containing products simply on the ground that it is possible that might not have been passed on to user employees like Gaylord.

2. Government Contractor Defense

Defendant contends that the trial court erred as a matter of law by denying defendant's motion for a directed verdict made on the basis that the military contractor's defense barred plaintiffs' claims and by directing a verdict for plaintiffs to the effect that the defense did not apply.

The government contractor defense was analyzed in some detail by *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500. In *Boyle* the father of a United States Marine brought suit against an aircraft manufacturer after his son died in a helicopter accident. (*Id.* at p. 502.) The claims under state tort law included one for defective design of the escape system. (*Id.* at p. 503.) The *Boyle* court concluded that the federal interest in the procurement of military supplies will require displacement of duties of care imposed under state law only when there is a "significant conflict" between the federal policy or interest and the operation of state law. (*Id.* at p. 507) *Boyle* was clear that this form of pre-emption is not automatic as when a state seeks to regulate in a field traditionally occupied by federal legislation. (*Ibid.*) "[T]o put the point differently, the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can. *But conflict there must be.*" (*Id.* at pp. 507-508.) (Emphasis added.)

Finding that in the case before it there was a significant conflict between the duty imposed by state law (escape

hatch mechanisms of the sort plaintiff believed were safest) and the duty imposed by the federal policy or interest (escape hatch mechanisms consistent with the government's specifications), the court concluded that state law must be displaced. (*Boyle v. United Technologies Corp.*, *supra*, 487 U.S. at p. 509.)

Defendant complains that the trial court erred in focusing upon the fact that the ablative tape was sold commercially before it was sold to the government; in short, the product was an off-the-shelf one which happened to meet government specifications for certain missile contracts. Defendant argues that instead of focusing upon whether the tape was military equipment the court should have looked to whether the missiles themselves were military equipment. We need not reach that issue because the problem here is that defendants were unable to demonstrate a "significant conflict," indeed any conflict, between their state duty to warn and the government specifications for the tape.

Absent some showing that there was a conflict, the very rationale for permitting the defense collapses. At trial an employee of U.S. Polymeric testified that there was nothing in the government specifications which precluded warning literature packaged with the tape. He also testified somewhat ambiguously that it was merely an "unwritten agreement" not to risk contaminating the tape by printing on its exterior wrapping.

It was thus undisputed that defendant could have complied with its state law imposed duty to supply warnings without impinging upon its duty to supply the product called for in the government specifications. (*In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 813 [makers of asbestos insulation were not acting in compliance with government specifications where the specifications would not have precluded warning so government contractor de-

fense not available].) The trial court did not err in ruling the government contractor defense was inapplicable here.

3. Jurisdiction

The case was bifurcated under the General Orders applicable to asbestos litigation in San Francisco Superior Court. At the time the court ordered bifurcation counsel for another defendant objected, stating that, since the primary issue as to his client was one of product identification and exposure (issues which would be determined only in the second phase of the trial), bifurcation would be unduly costly. Counsel for BP Chemicals added that he wished to join in the objection. He did not expand at all upon the basis of his objection.

On appeal defendant now complains that he was deprived of the opportunity to introduce evidence from an expert witness on comparative fault. The witness, Dr. Hinkes, would have testified on comparative fault, allocating the principal blame to Gaylord because of his smoking history. The trial court refused to permit Dr. Hinkes to testify in phase two on the question of the cause of Gaylord's lung cancer because by that stage of the trial the jury had concluded that it was unable to apportion causation. Defendant then apparently elected not to call Dr. Hinkes.

Defendant had a duty when objecting to the bifurcation to tell the trial court how it was being injured by the order. Having failed to do that at trial, it now tries to complain that it was precluded from introducing evidence on comparative fault. The problem here was not the trial court's bifurcation order, but as the judge noted, the jury's reluctance to accept defendant's theory that causation could be apportioned between asbestos exposure and smoking. Assuming that defendant preserved the issue, we are unpersuaded that the trial court erred in ordering bifurcation.

4. Damages for Future Medical Expenses

The jury awarded Gaylord $177,000 for future medical expenses which defendant contends is excessive. Defendant argues that Gaylord had only spent $57,000 on medical treatment up to the date of trial, and that the medical testimony suggested there were very few treatment options available to him given the advanced state of his cancer. Thus, defendant argues an award of three times what Gaylord had already spent on medical care must represent the result of passion or prejudice.

There was testimony that were Gaylord's cancer to recur and were he to opt for aggressive treatment of it, as he had done in the past, his medical costs would be "at least" a $100,000 a year. The same witness testified that nursing care currently costs $150 per eight-hour shift. Given this testimony we cannot say that the award "is so grossly disproportionate as to raise a presumption that it is the result of passion of prejudice." (*Schoreder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919.)

PLAINTIFFS' APPEAL

Prior to trial plaintiffs made an offer to compromise pursuant to section 998. The offer was made to three defendants of which BP Chemicals was one. Each defendant was listed separately but the amount of the offer as to each was $49,999. The offer stated that "[p]laintiffs ROBERT GAYLORD and JANET GAYLORD hereby offer to compromise with each defendant . . . in compromise of its several liability only, and not for a discharge of any other defendant's liability, and not for a discharge of any other claim."

In denying plaintiffs' motion for costs the trial court concluded that they were "not entitled to costs pursuant to C.C.P. § 998 because the § 998 demand was improperly

worded and did not contain individual demands for each plaintiff." At the hearing on the motion the court noted that the language in the offer to compromise "several liability only" could easily be read to mean that acceptance of the offer was settlement only of the non economic portion of plaintiffs' claim. (Civ. Code, § 1431 et seq.)

It is the general rule that a joint settlement demand made by more than one plaintiff will not trigger section 998 penalties because there is often no way to tell whether each plaintiff's recovery at trial was, as the section requires, "more favorable" than the offer. In *Hurlbut v. Sonora Community Hospital* (1989) 207 Cal.App.3d 388, a minor child and her parents sued the hospital in which she was delivered for medical malpractice. The plaintiffs made a joint offer to compromise under section 998 which consisted of a structured settlement. (*Id.* at p. 407.) Because the plaintiffs had offered no evidence as to the present value of the structured settlement they had failed to carry their burden to show that the judgment they obtained was more favorable than their settlement offer. (*Id.* at p. 409.) (Accord, *Gilman v. Beverly California Corp.* (1991) 231 Cal.App.3d 121, 124.)

If, however, it is unquestionably clear that the plaintiff has recovered more at trial than he or she could have from the joint offer it is proper to impose section 998 penalties. Thus in an action for personal injuries when a minor child and her mother made a joint offer to compromise for $1,000,000, and the mother subsequently dismissed her only claim, once the child received an award in excess of $23,000,000, the child had clearly obtained an award in excess of her settlement offer. (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 249, 263; accord, *Stallman v. Bell* (1991) 235 Cal.App.3d 740, 747 [single offer by two plaintiffs could be compared to single recovery by them], and *Winston Square Homeowner's Assn. v. Centex West,*

Inc. (1989) 213 Cal.App.3d 282, 294 [joint offer by defendants permits section 998 fees for defendant who is dismissed on statute of limitations].)

The reasoning of *Fortman* is applicable here. In this instance even if we assume that the entire amount of the joint settlement offer of $49,999 should be attributed to Mrs. Gaylord, her recovery of at least $50,000 exceeded the offer of compromise.[2] (As to Gaylord the issue is even clearer since his net recovery was $931,159.) Moreover, even though the offer to compromise could, as the trial court suggested, be read as an offer for only the non-economic damage claims, the $50,000 net recovery realized by Janet Gaylord was wholly for her non-economic loss of consortium claim. Thus, even if the offer is read in the most restrictive manner possible her result at trial was more favorable than the offer. Accordingly, the trial court erred in denying plaintiffs pre-judgment interest and reimbursement for expert witness fees as provided by section 998.

DISPOSITION

The judgment is affirmed, but the matter is remanded to the trial court for determination of the appropriate award to plaintiffs of pre-judgment interest and reimbursement of their expert witness fees.

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[2] The Jury returned a verdict for Gaylord in the amount of $1,304,000 and for Janet Gaylord in the amount of $200,000. After adjustments for settlement and the operation of Civil Code section 1431.2 the net judgment realized by Gaylord was $931,159 and for Mrs. Gaylord it was $50,000.

As the prevailing party in both appeals plaintiffs are entitled to an award of their costs on appeal.

Poché, Acting P.J.

WE CONCUR:

Perley, J.

Reardon, J.

Gaylord v. BP Chemicals
A059183

PROOF OF SERVICE

I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is Two Embarcadero Center, Suite 740, San Francisco, California 94111.

On August 22, 1994, following ordinary business practices, I placed for collection and mailing at the offices of Kenney, Burd & Markowitz, located at Two Embarcadero Center, Suite 740, San Francisco, California 94111, a copy of the attached **Petition for Review** in a sealed envelope with postage thereon fully prepaid, addressed as follows:

Original +14 copies hand delivered to:

Supreme Court of California
303 Second Street, South Tower, Room 8023
San Francisco, CA 94107

One copy hand delivered to:

Clerk of the Court of Appeal
303 Second Street, South Tower, 6th Floor
San Francisco, CA 94107

One copy mailed to trial judge:

The Honorable Laurence Kay
Superior Court of California
County of San Francisco
400 Van Ness Avenue
San Francisco, CA 94102

One copy sent via Federal Express to opposing counsel:

Bryce Anderson, Esq.
Law Offices of Bryce C. Anderson
1985 Bonifacio Street, Suite 102
Concord, CA 94520

I am readily familiar with the business' practice for collection and processing of correspondence for mailing with

the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 22, 1994 at San Francisco, California.

/s/ SHARON PROSSER
Sharon Prosser

APPENDIX 25

S.F. No.
(1 Civil No. A059183)
(S.F. Super. Ct. No. 891562)

In the Supreme Court

OF THE

State of California

ROBERT and JANET GAYLORD,

Plaintiffs, Respondents
and Cross-Appellants,

vs.

BP CHEMICALS (HITCO) INC.,

Defendant, Appellants
and Cross-Respondents

ANSWER TO PETITION FOR REVIEW

Appeal from Judgment on Jury Verdict of the Superior Court of the State of California in and for the City and County of San Francisco

Hon. Laurence Kay, Judge

Philip A. Harley, Esq.,
S.B.N. 147407
BRAYTON, GISVOLD & HARLEY
999 Grant Avenue
P.O. Box 2109
Novato, CA 94948
Telephone: (415) 898-1555

Bryce C. Anderson, Esq.,
S.B.N. 47390
LAW OFFICE OF BRYCE C. ANDERSON
1985 Bonifacio Street
Suite 102
Concord, CA 94520
Telephone: (510) 686-2300

Attorneys for Plaintiffs, Respondents and Cross-Appellants

Duplication and binding by Zandonella Reporting Service, 2321 Stanwell Drive, Concord, CA 94520 Telephone: (510) 685-6222

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S.F. No.
(1 Civil No. A059183)
(S.F. Super. Ct. No. 891562)

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

ROBERT and JANET GAYLORD,

Plaintiffs, Respondents
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vs.

BP CHEMICALS (HITCO) INC.,

Defendants, Appellants
and Cross-Respondents

ANSWER TO PETITION FOR REVIEW

Appeal from Judgment on Jury Verdict of the Superior Court of the State of California, in and for the City and County of San Francisco

Hon. Laurence Kay, Judge

TO THE HONORABLE MALCOLM M. LUCAS, CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Plaintiffs, respondents and cross-appellants herewith submit their answer to the petition for review in the above-entitled matter. A true and correct copy of the Opinion of

the Court of Appeal filed July 12, 1994 is attached as an appendix to this answer.

QUESTIONS PRESENTED

Plaintiffs Robert and Janet Gaylord would submit that defendant BP Chemicals (Hitco) Inc. has not correctly stated the issues on appeal in this case. Those issues are as follows:

1. Whether or not the supplier of asbestos-containing materials to a military contractor can assert the "military contractor defense" as set forth in *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500 [101 L.Ed.2d 442, 108 S.Ct.2510] when the defect is the absence of warnings on either the product or its packaging, and the military specifications do not prohibit or even cover the subject of warnings on either the product or the packaging.

2. Whether or not a tortfeasor who, through the manufacture of a defective product has exposed the victim to a toxic substance, can escape products liability for failing to warn of the known hazard merely because the victim's condition or risk of injury is worsened by exposure to a separate toxic substance.

3. Whether or not (a) offers to settle under Code of Civil Procedure section 998 should be interpreted according to the standard rules for interpretation of contracts, and (b) an offer under 998 which covers claims of two plaintiffs is sufficient to trigger liability for extra costs if it is less than the recovery of the plaintiff whose recovery was the smaller of the two.

GROUNDS FOR DENIAL OF REVIEW

The unpublished opinion in this case routinely affirmed a judgment on a jury verdict in an asbestos-related personal injury case. One of the central issues on appeal, the applicability of the military contractor defense, is an issue of federal law on which every major federal decision supports the opinion of the Court of Appeal. Defendants' other issue consists of an absurd contention that it is not liable for tortiously exposing people to carcinogenic asbestos dust because it did not know that this exposure, which was potentially harmful by itself, could be exacerbated if the plaintiffs were smokers. No California law supports defendant's position, which is flatly contrary to BAJI 3.77.

The issue raised by plaintiffs on the cross-appeal is one which was correctly resolved by the Court of Appeal and is not a significant problem in litigation today. The particular wording of plaintiffs' offer under Code of Civil Procedure section 998 was given a rather strained construction by the trial court. On appeal, the Court of Appeal held that even under this strained construction the literal requirements of the statute were met. Accordingly, the Court of Appeal reversed the order of the trial court which had denied plaintiffs their costs under section 998. Defendants has offered no basis for review other than the contention that the trial court's strained construction should have been given effect.

In summary, even if defendant's assertions of fact and law were correct, which they are not, defendant has presented no issue of statewide importance. Review should be denied as quickly as possible so that plaintiffs can receive the recovery which they need and deserve.

STATEMENT OF THE CASE

As the Opinion correctly points out, defendant BP Chemicals (Hitco) Inc. is the successor in interest to U.S. Polymeric, a company which manufactured asbestos tape. [Opinion, pp. 2-5.] Some of this tape was supplied to Kaiser Aerospace, which used it on the nose cones and rocket nozzles of missiles. [Id.] Robert Gaylord, an employee of Kaiser Aerospace, worked in an area in which up to 35 lathes were operating. [Id.] The lathes were engaged in finishing the nozzles and nose cones, a process which released huge quantities of asbestos-laden dust into the air. [Id.]

Although military specifications for the missiles called for the use of asbestos tape on the nozzles and nose cones, the specifications contained no requirements or prohibitions regarding warnings about the hazards of exposure to asbestos duty. [Opinion, p. 10.] Nevertheless, although the fact that asbestos exposure could cause lung cancer was known to the scientific community a least since the 1950's, defendant did not place any warnings on the asbestos products which it sold to Kaiser during the 1960's and early 1970's. [Opinion, pp. 5-8.] Gaylord was unaware of any hazard from exposure to asbestos dust until the 1970's, when asbestos manufacturers in general began putting warnings on their products. [Opinion, pp. 6,8.]

During the time that Robert Gaylord was exposed to asbestos dust, he also smoked about half a pack of cigarettes each day. [Opinion, p. 2.] In 1987 he was diagnosed with lung cancer. [Id.] Although he underwent radiation therapy, he had a recurrence of the disease in 1990, requiring surgery. [Id.] Gaylord, who was 59 years old at the time of trial, has been told by his doctors that his cancer is terminal.

Robert and his wife Janet brought suit against defendant BP Chemicals (Hitco) Inc., the successor to U.S.

Polymeric. The jury found defendant liable on the theory that it had failed to warn plaintiff of the hazards of asbestos exposure and awarded damages for past and future medicals, lost wages and earning capacity, and non-economic loss. [Opinion, pp. 2-3.] The jury also held that Robert Gaylord was contributorily negligent to the extent of 10% of his total damages. [Id.] After adjustment for Robert Gaylord's comparative fault, various pretrial settlements and the application of Civil Code section 1431.2, the net judgment for Robert Gaylord was $931,159.00 and the net judgment for Janet Gaylord was for $50,000.00. [J.A. 385-386, Tab 27.]

Plaintiffs had made a pretrial settlement offer to each of the defendants under Code of Civil Procedure section 998 for $49,999.00. Because of the combined effect of Proposition 51, the status of some defendants as successors to other defendants, the very real possibility of a future wrongful death claim, the offers were worded as being "in compromise of [each defendant's] several liability only, and not for a discharge of any other defendant's liability, and not for a discharge of any other claim." [J.A. 228-229.] The trial court held that this language was ambiguous because it could be construed as being a release of only non-economic damages. Defendant appealed, raising questions of substantial evidence, the government contractor defense, the trial court's pretrial order bifurcating liability and damages, and the award of damages for future medical expenses. Plaintiffs cross-appealed the denial of their section 998 costs.

On appeal, Division Four of the First District Court of Appeal affirmed the judgment for plaintiffs but reversed the post-trial order for costs in an unpublished opinion. Noting that Janet Gaylord's claim of loss of consortium was entirely non-economic, and that her recovery alone exceeded the settlement offer which covered both Janet and Robert, the Court of Appeal held that the trial court was in error and

reversed the order. Defendant's petition for rehearing was denied, and these proceedings followed.

ARGUMENT IN OPPOSITION TO PETITION FOR REVIEW

I. INTRODUCTION

Defendant exposed Robert Gaylord and many other workers like him to the hazards of asbestos dust at a time when those hazards were well understood by the scientific and industrial community. Notwithstanding this available scientific knowledge, defendant's products carried no warning of these hazards. The result was that Robert Gaylord contracted asbestos-related terminal lung cancer at age 54.

Prior to trial plaintiffs made identical and very modest settlement offers on the three remaining defendants under Code of Civil Procedure section 998. Two defendants settled, but defendant BP Chemicals rejected the offer and went to jury verdict. The result was a judgment which was substantially greater than the settlement figure. Defendant chose to appeal that judgment even though it had received a windfall through an erroneous ruling by the trial court on plaintiffs' section 998 offer. The result was that the judgment was affirmed, but the erroneous trial court ruling on costs was reversed.

In its petition for review, defendant continues it pointless rehash of arguments which have been rejected by both the trial court and the Court of Appeal. As set forth below, defendant's arguments are based on a misunderstanding of both the facts and the law of this case. Plaintiffs submit that review should be summarily denied.

II. DEFENDANT FAILED TO MAKE A PRIMA FACIE CASE FOR THE MILITARY CONTRACTOR DEFENSE

Defendant was a manufacturer of asbestos tape which was sold to plaintiff's employer for use in making military equipment. The tape was sold with no warnings that in its ordinary use it would give off respirable asbestos fibers which could cause a variety of asbestos-related diseases including cancer. Defendant urges that this case raises a significant issue of first impression regarding the applicability of the military contractor defense as set forth in *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500 [101 L.Ed.2d 442, 108 S.Ct.2510] to asbestos cases. in particular, defendant urges that the cases are in "conflict" on whether or not the defense applies to asbestos products. Plaintiffs submit that the conflict defendant sees is more apparent than real, and that in any event, this case does not present the issue.

The fundamental principle behind the military contractor defense is the need for federal pre-emption in areas of uniquely federal interest when the requirements of state law conflict with those imposed under a federal contract. *Boyle, supra,* 101 L.Ed.2d at 454-455. The Supreme Court specifically noted In *Boyle, supra,* 101 L.Ed.2d at 455-456 that if there is no conflict between the contractor's duty to comply with military specifications and the state-prescribed duty of care, state products liability law would not be pre-empted. Accordingly, if the specifications do not affect the ability of the maufacturer to incorporate safety devices or warnings into its products, they do not insulate the manufacturer from design product liability for failure to incorporate these safety devices or warnings.

Defendant was held liable on a theory that its products were defective because defendant failed to warn the ultimate users of the hazards presented by those products. Cases

following *Boyle* have noted that although "failure to warn" cases are within the scope of the defense, the requirement of binding specifications precluding other warnings must be met. In *Nicholson v. United Technologies* (D.Conn. 1988) 697 F.Supp.598, 604, the district court granted summary judgment upon proof that the contents of a manual accompanying military equipment were set by required specifications, stating:

> A contractor should not be held liable for deficiencies in the contents of a maintenance manual if the contents are dictated by the government.

In *In re New York City Asbestos Litigation* (1989) 542 N.Y.S.2d 118, 120, however, the defense was rejected for several reasons, including the absence of proof that warning labels on products would have conflicted with federal specifications requirements. Similarly in *Dorsé v. Armstrong World Industries, Inc.* (S.D. Fla. 1989) 716 F.Supp. 589, aff'd per curiam 898 F.2d 1487 (11th Cir. 1990), in which the federal district court applied both a question previously certified to the state court and the intervening decision in *Boyle*, the court stated:

> [T]he state-imposed duty of care that is the asserted basis of the contractor's liability (warning of the danger) is not "precisely contrary" to the duty imposed by the government contract (the duty of [sic] manufacture and deliver cement containing asbestos). In fact, the evidence suggests that *no* conflict exists between the state tort duty and the federal contractual duty. The defendant's exhibit of Navy Department specifications does not contain any prohibition against health warnings on the product. [Footnote omitted.] Moreover, the deposition of Eagle-Picher's Director of Claims indicates that the defendant could have complied with both its state tort law duty and its Navy contract.

Id. at 591. Finally, in *In re Brooklyn Naval Yard Asbestos Litigation* (2d Cir. 1992) 971 F.2d 831 upheld jury verdicts in asbestos cases on failure to warn theories even though the defendants were military contractors whose contracts specified the precise asbestos products used. Accordingly, defendant in the present case was required to show that federal specifications precluded warnings on its packages. Although defendant was well aware that its attempt to use the military contractor defense was being challenged by plaintiffs, the undisputed testimony in this case was that no military specification prevented placing warnings on the packaging of defendant's asbestos products, or even directly on the products themselves.[1]

The cases cited by defendant to demonstrate the "split of authority" actually support plaintiffs.[2] *Brooklyn Naval Yard Asbestos, supra,* and *Dorsé v. Armstrong World Industries, Inc., supra* held that the defense was applicable to a design defect case, but not a failure to warn case.[3] The

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[1] Defendant presented some rather strange testimony about unwritten agreements not to put warnings directly on the tape itself. [RT 1596.] Although plaintiffs' counsel has never seen a case on point, it seems self-evident that if the military contractor defense requires proof that the government approved reasonably precise specifications which incorporate the defect, those specifications must be written. In any event, the evidence was undisputed that there was no restriction on placing warning labels on the packages in which the tape came. [RT 1398.]

[2] Even if defendant were correct that there is a split of authority, it is not one that this Court can resolve. The military contractor defense is an issue of federal law and the cases cited by defendant are federal cases.

[3] *Dorsé v. Armstrong World Industries, Inc.* (Fla. 1987) 512 So.2d 1265, cited by defendant, is not the relevant decision. That case was a certification of a question by a federal court to a state court under a procedure allowed by state law to determine whether Florida recognized a government contractor defense. After the state court decision was rendered, *Boyle* was decided, rendering the state court decision moot.

Ninth Circuit in *In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 812-813, held that the defense was applicable to neither design defect nor failure to warn cases. Thus, the second, ninth and eleventh circuits have expressly held that manufacturers of asbestos products may be held liable on a failure to warn theory even when those asbestos products are incorporated into military equipment.[4] Finally, in *Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1317-1318 [273 Cal.Rptr. 214], Division Three of the First District Court of Appeal reversed a summary judgment because the defendants, although proving that there were warnings on their products which were mandated by military specifications, failed to prove that additional warnings were prohibited. *A fortiori*, in a failure to warn case in which a defendant fails to prove either (a) that military specifications covered the subject of warnings at all, or (b) that defendant gave any warnings at all, that defendant is not entitled to go to the jury on the issue of the military contractor defense.

III. PLAINTIFFS WERE ENTITLED TO GO TO THE JURY ON A THEORY OF FAILURE TO WARN

Defendant BP Chemicals rehashes in its petition for review the argument previously advanced on appeal that the judgment in plaintiff's favor cannot stand upon a "failure to warn" theory. Defendant's argument is that (1) because Robert Gaylord was held to be comparatively at fault, his lung cancer must have been caused by the synergistic effect of smoking and asbestos exposure; and (2) because the

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[4]*Niemann v. McDonnell Douglas Corp.* (S.D. ID. 1989) 721 F.Supp. 1019 involved a suit against the contractors themselves, McDonnell Douglas and General Dynamics, and not against the manufacturers of the asbestos products in question. This is a considerably different legal issue; moreover, one opinion from an Illinois federal trial court does not exactly create a "split of authority."

synergistic effect was not known until after his last exposure to defendant's products, defendant could not have known to warn him of this hazard. In making this argument, defendant misconstrues both the nature of the synergistic effect of smoking and asbestos exposure and the nature of plaintiffs' theory of liability.

Plaintiffs sued defendant BP Chemicals not because smoking and asbestos exposure can together cause cancer, but because asbestos exposure alone is a dangerous carcinogen against which a warning should have been given. No contention was made, nor could one have been made, that any "state of the art" defense was applicable to defendant's liability as a manufacturer of asbestos products. Cf. *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987 [281 Cal.Rptr. 528, 810 P.2d 549]. Asbestos dust has been known to be a health hazard for virtually this entire century, and it has specifically been known to be a cause of lung cancer before Robert Gaylord ever began working at Kaiser Aerospace. [See Opinion, pp. 2 and 6.]

Defendant has cited three cases for the proposition that it had no duty to warn smokers of the hazards of asbestos exposure because the synergistic effect of smoking and asbestos exposure was not known until the early 1970's. In each of the cases cited by defendant, however, the defendant manufactured a product which was harmless or beneficial by itself, but which presented unusual hazards when used in combination with other products. Thus in *Skill v. Martinez* (D.N.J. 1981) 91 F.R.D. 498, 508-509 the issue was not a failure to warn of the dangers of taking birth control pills by themselves; the manufacturer had adequately warned of these dangers. Instead, the issue was defendant's failure to warn of the risk of a stroke when the pills were taken by smokers. Similarly, in *Barry V. Don Hall Laboratories* (Ore.App. 1982) 642 P.2d 685 the issue was not the failure to warn of the hazards of taking vitamin C, but rather, the

failure to warn of the synergistic effect between vitamin C and sugar on the risk of tooth decay. In each case it was only the synergistic effect which presented the alleged defect requiring a warning.

If asbestos exposure were harmless by itself, or if defendant had adequately warned of the hazards of asbestos exposure by itself, the arguments it has raised on appeal might have had some merit. There was ample testimony, however, that Robert Gaylord and his co-workers received a level of asbestos exposure which was by itself capable of causing lung cancer. [See, e.g., RT 1426 to 1437 and Exhibit 22.] That Robert Gaylord's lung cancer may have been caused by both smoking and asbestos exposure does not exonerate defendant; it is well established in California that a defendant is liable for damages if its tortious conduct is a concurring cause of plaintiff's injury, even though not the sole cause.[5] See BAJI 3.77; see generally, 6 Witkin, *Summary of California Law* (9th Ed. 1985) "Torts" § 970 pp. 360-361 and cases cited therein. Defendant, which failed to warn of the known hazards of asbestos exposure, was properly held liable for the results of its conduct.

IV. THE COURT OF APPEAL CORRECTLY REVERSED THE TRIAL COURT'S ERRONEOUS RULING REGARDING PRETRIAL SETTLEMENT OFFERS

Prior to trial plaintiffs made a statutory settlement offer of $49,999.00 to each of the defendants under Code of Civil

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[5] As the Court of Appeal noted, defendant did not ask for jury findings as to the nature of Robert Gaylord's comparative negligence, and so the basis for its finding cannot actually be determined. [Opinion, p. 6.]

Procedure section 998. This offer contained the following language:

> This offer is made to each defendant in the sum specified *for its several liability only,* and the payment of said sum shall release the personal injury and loss of consortium claims against said defendants.
>
> Plaintiffs ROBERT GAYLORD and JANET GAYLORD hereby offer to compromise with each defendant listed on Exhibit A, for the amount indicated, *in compromise of its several liability only, and not for a discharge of any other defendant's liability, and not for a discharge of any other claim.* [J.A. 228-229, Tab 14; emphasis added.]

Defendant rejected the offer without any inquiry as to its meaning. After the jury's verdict was adjusted for pretrial settlements, the judgment was considerably larger than this offer; in fact, Janet Gaylord's claim alone, which was entirely non-economic damages, exceeded this offer.

After the verdict plaintiffs sought their extra costs under section 998. Defendants then contended for the first time that the emphasized wording above could be misinterpreted to mean that plaintiffs were offering to settle only the non-economic portions of their claims for the stated amounts. [See RT 8/28/92, p. 11-12; see also J.A. 378-379, Tab 25.] The trial judge apparently accepted this argument and denied plaintiffs their extra costs under section 998.

On appeal, the Court of Appeal reversed this order because, even under this restrictive interpretation, Janet Gaylord's recovery, which was entirely non-economic damages and was also the smaller portion of the overall verdict, exceeded the offer.[6] Defendant contended on petition for

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[6]Defendant states in its petition for review that "In the Opinion, the Court acknowledged that the plaintiffs' statutory offer was only to

rehearing, and contends again on petition for review, that plaintiffs should be denied their extra costs because the offer could have been read to be a settlement of non-economic damages only. Plaintiff submits that a settlement offer must be interpreted by the same rules of construction that apply to contracts and statutes and that, under these rules, defendant's contentions are spurious.

The interpretation of the section 998 offer which defendant advanced and which the trial court accepted is not a reasonable one. Although it is true that any uncertainty in a contract must be construed against the one drafting the document and responsible for the uncertainty, see Civil Code section 1654, this section also provides that this rule applies "[i]n cases of uncertainty not removed by the preceding rules. . . ." Other rules which take precedence are section 1641, providing that the whole of a contract is to be taken together to give effect to every part, section 1647, providing that contracts may be explained "by reference to the circumstances under which [they are] made. . . ." and section 1643, providing that contracts are to be interpreted so as to make them "lawful, operative, definite, reasonable and capable of being carried into effect. . . ." Application of these rules demonstrates that the interpretation adopted by the trial court is incorrect.

The use of the words "its several liability only and not for discharge of any other defendant's liability, and not for a

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compromise their noneconomic damages claims." This is a misstatement of the Court's Opinion. The Court actually stated that "the offer to compromise could . . . be read as an offer for only the non-economic damage claims. . . ." [Opinion, p. 14.] The Court then correctly noted that this offer, even if read in this "most restrictive manner possible" was less than the recovery made by Janet Gaylord alone, and that her claim was by its very nature entirely non-economic damages. [Id.] Thus, even if plaintiffs' offer were given this extremely strained construction, defendant could have settled Janet Gaylord's entire claim and the non-economic portion of Robert Gaylord's claim for less than Janet Gaylord obtained by the jury verdict after credit for other settlements.

discharge of any other claim" is necessary because of certain aspects of the asbestos litigation. First, the asbestos litigation typically involves a large number of defendants. Accordingly, plaintiffs must make clear that the offer is being given to each defendant separately in the stated amounts. Were this wording not included, the defendants would raise the objections raised in *Randles v. Lowry* (1970) 4 Cal.App.3d 68 [84 Cal.Rptr. 321], *Hutchins v. Waters* (1975) 51 Cal.App.3d 69 [123 Cal.Rptr. 819] and *Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579 [11 Cal.Rptr.2d 820] that they could not be required to obtain the consent of other co-defendants in order to settle.

A second aspect of the asbestos litigation is that there may be three successive claims arising out of one worker's exposure. A fundamental aspect of asbestos disease is that in either the non-malignant or malignant form it has a latency period which may potentially be several decades. See generally, *Borel v. Fibreboard Corp.* (5th Cir. 1973) 493 F.2d 1076, 1083. Accordingly, a plaintiff may sue and recover for non-malignant asbestos disease, then may contract a malignant disease such as mesothelioma for which he can bring a personal injury action,[7] and then, when the plaintiff worker dies, his or her family may bring a wrongful death claim under Code of Civil Procedure section 377. For this reason it is important for the plaintiff worker making a demand under section 998 to specify that only the claims involved in the immediate litigation are being settled, and not any potential claims for asbestos-related cancer or wrongful death. Plaintiffs in this case did so by specifying

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[7] A claim for cancer is generally considered to be a separate cause of action with separate statute of limitations and is not barred under doctrines of merger and bar by a prior adjudication involving non-malignant asbestos disease. See San Francisco Complex Asbestos Litigation General Order No. 27 and accompanying memorandum.

that the section 998 offer would not "discharge [ ] any other claim."

Finally, there are a number of asbestos defendants who are successors in interest to other defendants or who may have contractual indemnity rights and obligations. See, e.g., *Kaminski v. Western MacArthur Co.* (1985) 175 Cal.App.3d 445 [220 Cal.Rptr. 895] (defendant held to be successor under product line theory). Because of the potential that, notwithstanding Code of Civil Procedure sections 877 and 998, a settling defendant may have some residual contractual indemnity liability or some other connection with a non-settling defendant, an asbestos plaintiff must specify that no promise is made not to pursue any other defendant.

The offer made by plaintiffs under section 998 states that "payment of said sum shall release *the personal injury and loss of consortium claims* against said defendants." [Emphasis added.] This language cannot be reasonably construed to mean anything but that both economic and non-economic damage claims are being released. Moreover, the offer states that "[a]cceptance of this offer by any defendant specifically shall constitute agreement that the plaintiffs may continue to proceed against other non-settling tortfeasors . . . ." As set forth above, this language is necessary so that plaintiff will not be prevented from going after related but legally separate entities. This language also indicates rather plainly that plaintiffs *cannot* proceed on the personal injury or loss of consortium claim against the settling defendant. In summary, if the language of the section 998 offer is interpreted in a reasonable manner, in light of the surrounding circumstances and so as to give effect to all of its terms, it cannot be given the meaning adopted by the trial court. The Court of Appeal correctly

reversed this order, and defendant has offered no basis for changing that decision.[8]

V. CONCLUSION

Defendant BP Chemicals (Hitco) Inc., like many other asbestos defendants, manufactured its products for several years without the slightest concern for the hazards which these products posed to those working with them. These hazards had been documented years before Robert Gaylord began his employment with Kaiser Aerospace in 1956, and the medical literature covering the hazards of asbestos exposure, including the risk of cancer was readily available to defendant. Nevertheless, BP Chemicals chose not to print warnings even on the packages in which its products came. Although defendant's officers and directors are undoubtedly distressed that the company must now pay for its years of misconduct, their distress is nothing compared to the suffering undergone by the Gaylords as Robert Gaylord slowly dies of asbestos-related lung cancer. The Court of Appeal has correctly upheld the judgment finding defendant liable for the harm it inflicted on the Gaylords.

Defendant's contentions regarding plaintiffs' settlement offer are something less than entirely candid. Having chosen to reject a very modest settlement offer, defendants attempted to seize on a strained construction of that offer in order to avoid the statutory consequences of their decision.

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[8] Defendant's attempt to justify the trial court's order on the ground that it would "discourage settlements" is spurious. Neither *Stell v. Jay Hales Dev't Co.* (1992) 11 Cal.App.4th 1214 [156 Cal.Rptr.2d 220] nor *Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266 [276 Cal.Rptr. 321, 801 P.2d 1072] would support defendant's tortured interpretation of the settlement offer. Moreover, neither case would support an order denying costs when the offer would have (even under defendant's tortured reading) discharged all of one plaintiff's claim, and that claim alone exceeds the offer.

Although defendants managed to convince a busy trial judge into committing error on this issue, the Court of Appeal has properly corrected that error.

For all of the foregoing reasons, the petition for review should be denied.

Dated: August 29, 1994

Respectfully submitted,

BRAYTON, GISVOLD & HARLEY

and

LAW OFFICES OF BRYCE C. ANDERSON

By: /s/ BRYCE C. ANDERSON

Bryce C. Anderson
Attorneys for Plaintiffs, Respondents and Cross-Appellants

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

ROBERT GAYLORD et al.,

Plaintiffs, Cross-Appellants and Respondents,

v.

BP CHEMICALS (HITCO) INC.,

Defendants, Cross-Respondents and Appellant.

A059183
(San Francisco Super. Ct. No. 891562)

Defendant, BP Chemicals (Hitco), Inc. (hereafter BP Chemicals), appeals from a judgment in favor of plaintiffs, Robert Gaylord (Gaylord) and Janet Gaylord, in an action for personal injuries stemming from Gaylord's workplace exposure to asbestos. Plaintiffs likewise appeal from an order denying them prejudgment interest and expert witness fees under Code of Civil Procedure section 998.[1]

FACTS

Gaylord went to work for Kaiser Aerospace in 1956 as a machinist. Between that time and 1987 when he was forced by ill health to stop working he spent much of his career operating a tracer lathe which finished missile parts. The parts which came to him until the early 1980's for finishing were covered with an ablative tape which contained asbestos. The asbestos in the tape acted to shield the nose cones and rocket nozzles from the high temperatures which occurred during firing and flight. Some of the asbestos tape

[1] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

used by Kaiser Aerospace was supplied by U.S. Polymeric, a predecessor to BP Chemicals.

In the area in which Gaylord worked up to 35 lathes might be operating at one time. The finishing process released large quantities of asbestos-laden dust into the air. During the entire period of his employment at Kaiser, Gaylord was a smoker who smoked on average half a pack a day.

In 1987 Gaylord had a chest x-ray which revealed what was eventually diagnosed as being lung cancer. Although he was initially treated with radiation therapy, a recurrence of the disease in 1990 required surgery. A portion of his lung tissue was removed at the time of the surgery and subjected to examination by a pathologist.

Gaylord's claim was consolidated for trial with that of another asbestos plaintiff. The trial was bifurcated and the first phase of the trial dealt with the issues of medical causation and damages. After the first phase the jury returned a special verdict finding that Gaylord's injury was caused by asbestos exposure and that it could not apportion his injury between his smoking and his asbestos exposure. It awarded Gaylord $5,000 for future medical monitoring, $234,000 for medical damages, $865,000 for lost wages and earning capacity and $200,000 in non-economic loss. Janet Gaylord was awarded $200,000 on her loss of consortium claim.

Phase two of the trial addressed the questions of defendant's liability and Gaylord's contributory negligence. At its conclusion the jury returned special verdicts finding that defendant's tape was defective in design, that the company had failed to provide adequate warnings, that Gaylord was exposed to asbestos contained in defendant's tape and his exposure was a legal cause of his injury. Finally,

the jury apportioned defendant's fault at 25 percent of Gaylord's injury.

APPEAL

Discussion

On appeal defendant raises several claims of error. It argues that there is no substantial evidence to support the finding that Gaylord's injury resulted from exposure to its products or the finding that it breached its duty to warn. Defendant also argues that the court erred as a matter of law by ruling that the government contractor defense was inapplicable and by bifurcating the trial. Lastly, defendant maintains that the damages awarded to Gaylord for future medical expenses are excessive.

1. Substantial Evidence Claims

In reviewing defendant's claim that there is no substantial evidence to support certain findings this court must resolve all conflicts in favor of the Gaylords and accord their verdict the benefit of every reasonable inference. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544.)

Defendant argues that first, there was no substantial evidence that asbestos, rather than smoking, was the cause of Gaylord's cancer, and second, that its asbestos containing products formed only a small portion of the asbestos to which Gaylord was exposed.

There was ample evidence before the jury that Gaylord has been a smoker for over 30 years and had smoked at least half a pack of cigarettes a day until he became ill with what was eventually diagnosed as lung cancer. Although one expert (Morgan) testified that Gaylord's exposure to asbestos was not a substantial factor in causing his lung cancer and another (Hammar) that a pathological exam of the removed portions of Gaylord's lung tissue did not permit a

diagnosis of asbestosis, there was also expert testimony (Hammar) that the type of cancer from which Gaylord suffered is associated with exposure either to cigarette smoking or to asbestos. Moreover, there was expert testimony (Hammar) that a high level of asbestos exposure alone would have been sufficient to have caused Gaylord's lung cancer. Another expert (Smith) testified that even a relatively brief exposure to asbestos was sufficient to substantially elevate the risk of eventually contracting cancer.

Defendant also maintains that even if asbestos caused Gaylord's lung cancer the asbestos containing products it supplied to his employer would have been only a very small portion of the asbestos to which he was exposed. It was undisputed that Gaylord worked as a lathe operator to varying extents on the Advanced Minuteman, Pershing and Polaris missile systems. Defendant points to Gaylord's testimony that he had machined 80-90 percent of the Advanced Minuteman parts and points out that it did not supply asbestos tape for that missile program, only for the Polaris and Poseidon programs. There was also evidence, however, that Gaylord's employer was a major customer for defendant during certain periods in the 1960's and 1970's. Due to the passage of time it was no longer possible to quantify the amount of asbestos containing products defendant supplied to the company prior to 1969. Defendant was, however, the sole supplier to the company of the asbestos tape used on Poseidon nose cones.

There was ample testimony that the area in which Gaylord worked side by side with up to 35 other lathe operators was filled with dust from the machining process. Various vacuum systems were installed by the company to remove the dust, but it was not until 1982 that respirators were supplied to the lathe operators.

There was more than enough evidence to support the jury's finding that Gaylord was exposed to the asbestos

containing products manufactured by defendant and that asbestos was a substantial factor in causing his lung cancer.

Defendant also asserts that there was no substantial evidence to support the jury's finding that it had breached its duty to warn of the risks associated with use of its ablative tape. Defendant maintains that "the evidence was undisputed that [it] did not know, nor could it have known, of the specific hazard that caused Mr. Gaylord's lung cancer. The jury found that this hazard was the combined, synergistic effect of cigarette smoking and asbestos exposure . . . ." Defendant argues that the synergistic effect was not widely known until the late 1970's after it had stopped using asbestos in its products.

As an initial matter the jury did not make a finding that Gaylord was injured by the synergistic effect of cigarette smoke and asbestos fibers. The theory was certainly argued to it, but no such finding was made. Even if it had made such a finding, the risk to which Gaylord was exposed was lung cancer. There was testimony establishing that the link between lung cancer and asbestos exposure was widely known in the early 1950's. Accordingly, one witness testified that some asbestos products carried warnings by the mid-1960's, and by the early 1970's "six or eight of the major manufacturers" put "warnings about the dust hazard on their products."

In order for a plaintiff such as Gaylord to recover under a strict liability theory for failure to warn he need only show "that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002.)

It was undisputed that defendant did not supply any warnings on its products until 1972 or 1973. Likewise, defendant conceded that it knew that the lathing process created dust. There was sufficient evidence from which the jury could infer that defendant knew asbestos exposure put workers at increased risk for lung cancer and that it should therefore have provided warnings that inhaling the dust while lathing parts covered with its ablative tape was a hazard.

Defendant also argues that, in any event it would have been to no avail for it to have included warnings in literature supplied with the tape because in Gaylord's case once the tape was received at the company it was removed from its packaging by another department, applied to the nose cones and autoclaved before Gaylord ever saw it. Thus, defendant contends any warnings included on the packaging would not have come to Gaylord's attention even if it had provided such warnings.

Arguing that a manufacturer has no duty to warn where a warning could not reduce the risk of harm, defendant relies on *Rosburg v. Minnesota Mining & Mfg. Co.* (1986) 181 Cal.App.3d 726, 734-735. In *Rosburg* the plaintiff argued that the maker of a breast implant had a duty in the years following her implant to warn physicians that many of its implants had begun to spontaneously deflate. *(Id.* at p. 734.) The trial court rejected that argument first because it found the warnings given at the time of the surgery sufficiently cautioned that the long term use of the implants was not guaranteed, and second, because it found that the physician knew at the time of the surgery that there was a risk of spontaneous deflation. *(Id.* at p. 735). Accordingly, the court found that "no harm could have been caused by failure to warn of a risk already known. [Citation.]" (*Ibid.*)

This not a case in which there was a warning given, but plaintiffs have attacked it as inadequate either in describing

the risk or not being designed to reach the intended user of the product. Gaylord testified that it was only in the 1970's that he learned that asbestos posed a health risk. Defendant can scarcely maintain that it had no obligation to provide warnings about its asbestos containing products simply on the ground that it is possible that might not have been passed on to user employees like Gaylord.

2. Government Contactor Defense

Defendant contends that the trial court erred as a matter of law by denying defendant's motion for a directed verdict made on the basis that the military contractor's defense barred plaintiffs' claims and by directing a verdict for plaintiffs to the effect that the defense did not apply.

The government contractor defense was analyzed in some detail by *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500. In *Boyle* the father of a United States Marine brought suit against an aircraft manufacturer after his died in a helicopter accident. (*Id.* at p. 502.) The claims under state tort law included one for defective design of the escape system. (*Id.* at p. 503.) The *Boyle* court concluded that the federal interest in the procurement of military supplies will require displacement of duties of care imposed under state law only when there is a "significant conflict" between the federal policy or interest and the operation of state law. *(Id.*at p. 507.) *Boyle* was clear that this form of pre-emption is not automatic as when a state seeks to regulate in a field traditionally occupied by federal legislation. *(Ibid.)*"[T]o put the point differently, the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can. *But conflict there must be.*" *(Id.*at pp. 507-508.) (Emphasis added.)

Finding that in the case before it there was a significant conflict between the duty imposed by state law (escape

hatch mechanisms of the sort plaintiff believed were safest) and the duty imposed by the federal policy or interest (escape hatch mechanisms consistent with the government's specifications), the court concluded that state law must be displaced. *Boyle v. United Technologies Corp., supra*, 487 U.S. at p. 509.)

Defendant complains that the trial court erred in focusing upon the fact that the ablative tape was sold commercially before it was sold to the government; in short, the product was an off-the-shelf one which happened to meet government specifications for certain missile contracts. Defendant argues that instead of focusing upon whether the tape was military equipment the court should have looked to whether the missiles themselves were military equipment. We need not reach that issue because the problem here is that defendants were unable to demonstrate a "significant conflict," indeed any conflict, between their state duty to warn and the government specifications for the tape.

Absent some showing that there was a conflict, the very rationale for permitting the defense collapses. At trial an employee of U.S. Polymeric testified that there was nothing in the government specifications which precluded warning literature packaged with the tape. He also testified somewhat ambiguously that it was merely an "unwritten agreement" not to risk contaminating the tape by printing on its exterior wrapping.

It was thus undisputed that defendant could have complied with its state law imposed duty to supply warnings without impinging upon its duty to supply the product called for in the government specifications. (*In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 813 [makers of asbestos insulation were not acting in compliance with government specifications where the specifications would not have precluded warning so government contractor de-

fense not available].) The trial court did not err in ruling the government contractor defense was inapplicable here.

3. Bifurcation

The case was bifurcated under the General Orders applicable to asbestos litigation in San Francisco Superior Court. At the time the court ordered bifurcation counsel for another defendant objected, stating that, since the primary issue as to his client was one of product identification and exposure (issues which would be determined only in the second phase of the trial), bifurcation would be unduly costly. Counsel for BP Chemicals added that he wished to join in the objection. He did not expand at all upon the basis of his objection.

On appeal defendant now complains that he was deprived of the opportunity to introduce evidence from an expert witness on comparative fault. The witness, Dr. Hinkes, would have testified on comparative fault, allocating the principal blame to Gaylord because of his smoking history. The trial court refused to permit Dr. Hinkes to testify in phase two on the question of the cause of Gaylord's lung cancer because by that stage of the trial the jury had concluded that it was unable to apportion causation. Defendant then apparently elected not to call Dr. Hinkes.

Defendant had a duty when objecting to the bifurcation to tell the trial court how it was being injured by the order. Having failed to do that at trial, it now tries to complain that it was precluded from introducing evidence on comparative fault. The problem here was not the trial court's bifurcation order, but as the judge noted, the jury's reluctance to accept defendant's theory that causation could be apportioned between asbestos exposure and smoking. Assuming that defendant preserved the issue, we are unpersuaded that the trial court erred in ordering bifurcation.

4. Damages for Future Medical Expenses

The jury awarded Gaylord $177,000 for future medical expenses which defendant contends is excessive. Defendant argues that Gaylord had only spent $57,000 on medical treatment up to the date of trial, and that the medical testimony suggested there were very few treatment options available to him given the advanced state of his cancer. Thus, defendant argues an award of three times what Gaylord had already spent on medical care must represent the result of passion or prejudice.

There was testimony that were Gaylord's cancer to recur and were he to opt for aggressive treatment of it, as he had done in the past, his medical costs would be "at least" a $100,000 a year. The same witness testified that nursing care currently costs $150 per eight-hour shift. Given this testimony we cannot say that the award "is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." (*Schroeder* v. *Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919.)

PLAINTIFFS' APPEAL

Prior to trial plaintiffs made an offer to compromise pursuant to section 998. The offer was made to three defendants of which BP Chemicals was one. Each defendant was listed separately but the amount of the offer as to each was $49,999. The offer stated that "[p]laintiffs ROBERT GAYLORD and JANET GAYLORD hereby offer to compromise with each defendant . . . in compromise of its several liability only, and not for a discharge of any other defendant's liability, and not for a discharge of any other claim."

In denying plaintiffs' motion for costs the trial court concluded that they were "not entitled to costs pursuant to C.C.P. §998 because the §998 demand was improperly

worded and did not contain individual demands for each plaintiff." At the hearing on the motion the court noted that the language in the offer to compromise "several liability only" could easily be read to mean that acceptance of the offer was settlement only of the non economic portion of plaintiffs' claim. (Civ. Code, § 1431 et seq.)

It is the general rule that a joint settlement demand made by more than one plaintiff will not trigger section 998 penalties because there is often no way to tell whether each plaintiff's recovery at trial was, as the section requires, "more favorable" than the offer. In *Hurlbut v. Sonora Community Hospital* (1989) 207 Cal. App.3d 388, a minor child and her parents sued the hospital in which she was delivered for medical malpractice. The plaintiffs made a joint offer to compromise under section 998 which consisted of a structured settlement. (*Id.* at p. 407.) Because the plaintiffs had offered no evidence as to the present value of the structured settlement they had failed to carry their burden to show that the judgment they obtained was more favorable than their settlement offer. (*Id.* at p. 409.) (Accord, *Gilman v. Beverly California Corp.* (1991) 231 Cal. App.3d 121, 124.)

If, however, it is unquestionably clear that the plaintiff has recovered more at trial than he or she could have from the joint offer it is proper to impose section 998 penalties. Thus in an action for personal injuries when a minor child and her mother made a joint offer to compromise for $1,000,000, and the mother subsequently dismissed her only claim, once the child received an award in excess of $23,000,000, the child had clearly obtained an award in excess of her settlement offer. (*Fortman v. Hemco, Inc.* (1989) 211 Cal. App.3d 241, 249, 263; accord, *Stallman v. Bell* (1991) 235 Cal.App.3d 740, 747 [single offer by two plaintiffs could be compared to single recovery by them], and *Winston Square Homeowner's Assn. v. Centex West,*

Inc. (1989) 213 Cal.App.3d 282, 294 [joint offer by defendants permits section 998 fees for defendant who is dismissed on statute of limitations].)

The reasoning of *Fortman* is applicable here. In this instance even if we assume that the entire amount of the joint settlement offer is $49,999 should be attributed to Mrs. Gaylord, her recovery of at least $50,000 exceeded the offer of compromise.[2] (As to Gaylord the issue is even clearer since his net recovery was $931,159.) Moreover, even though the offer to compromise could, as the trial court suggested, be read as an offer for only the non-economic damage claims, the $50,000 net recovery realized by Janet Gaylord was wholly for her non-economic loss of consortium claim. Thus, even if the offer is read in the most restrictive manner possible her result at trial was more favorable than the offer. Accordingly, the trial court erred in denying plaintiffs pre-judgment interest and reimbursement for expert witness fees as provided by section 998.

DISPOSITION

The judgment is affirmed, but the matter is remanded to the trial court for determination of the appropriate award to plaintiffs of pre-judgment interest and reimbursement of their expert witness fees.

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[2] The jury returned a verdict for Gaylord in the amount of $1,304,000 and for Janet Gaylord in the amount of $200,000. After adjustments for settlement and the operation of Civil Code section 1431.2 the net judgment realized by Gaylord was $931,159 and for Mrs. Gaylord it was $50,000.

As the prevailing party in both appeals plaintiffs are entitled to an award of their costs on appeal.

_____

Poché, Acting P.J.

WE CONCUR:

_____

Perley, J.

_____

Reardon, J.

Gaylord v. BP Chemicals
A059183

Kenney, Burd & Markowitz
Kenney, Stephen C.
4 Embarcadero Ctr.
Suite 2500
San Francisco, CA 94111

A059183

APPENDIX 26

Case Number: _____

IN THE
SUPREME COURT OF CALIFORNIA

ROBERT and JANET GAYLORD,

Plaintiffs, Respondents,
Cross-Appellants,

v.

BP CHEMICALS (HITCO) INC.,

Defendant, Appellant
Cross-Respondent.

San Francisco Superior
Court Action No: 891562
Trial Judge: The Honorable
Laurence Kay

After a Decision by the Court of Appeal
First Appellate District, Division Four
[Case No. A0 59283]

REPLY TO OPPOSITION TO PETITION FOR REVIEW

STEPHEN C. KENNEY, ESQ. (State Bar No: 053883)
TOM K. HAMMITT, ESQ. (State Bar No: 145852)
KENNEY, BURD & MARKOWITZ
Two Embarcadero Center, Suite 740
San Francisco, California 94111
Telephone: (415) 397-3100

Attorneys for Appellant and Cross-Respondent
BP CHEMICALS (HITCO) INC.

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PETITIONER BP CHEMICALS (HITCO) INC. ("BP Chemicals"), defendant, appellant and cross-respondent in this matter, submits the following reply to the answer to BP Chemicals' petition for review filed by plaintiffs/respondents/cross-appellants Robert and Janet Gaylord ("the plaintiffs").

I

INTRODUCTION

Rather than attempting to minimize the important need for review of the unresolved legal issues presented in the petition, the plaintiffs attempt a diversion by arguing that the issues identified by BP Chemicals were not the issues framed on appeal. The answer brief does not address the merits of BP Chemicals' arguments for review, but, instead, attempts to substitute a different set of issues, then explains why those issues should not be reviewed. As the petition accurately stated the issues framed on appeal, the plaintiffs' answer merely demonstrates their lack of any credible argument in opposition to review.

The first issue is whether the federal common-law "government contractor defense" adopted by the U.S. Supreme Court in *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500 *("Boyle")* displaces state-law *design defect* claims against manufacturers of asbestos-containing products the government specified for use in constructing ablative heat shields in the rocket motors of certain strategic missiles. The plaintiffs claim that the only issue on appeal was whether the government contractor defense applies to *failure-to-warn* claims, a point that BP Chemicals never contended, due to the First District's contrary holding in *Jackson v. Deft. Inc.* (1990) 223 Cal.App.3d 1305, 273 Cal. Rptr. 214.

The second issue is whether, in toxic tort actions, the Court should recognize a distinct legal cause of injury in the "synergistic effect" that occurs between exposures to certain different potentially harmful substances, which multiplies the risk of injury far beyond the sum of the risks of the exposures considered separately or in simple combination. Recognizing synergistic effects as distinct legal causes, in appropriate cases, is consistent with every located case holding on this issue, and has an important effect on the handling of failure-to-warn claims because of the specificity of the warning required.

In many asbestos actions involving failure-to-warn claims, including the present matter, the "synergistic effect" theory has been applied to impose strict liability against asbestos defendants for smokers' diseases based solely on the plaintiff's occupational history, rather than any medically detectable signs of asbestos exposure. As in the present matter, the "synergistic effect" theory has been the adjudicated basis for failure-to-warn liability even though the plaintiffs' alleged asbestos exposures predate the discovery of the synergistic effect in the late 1970s.

The plaintiffs erroneously state that the second issue on appeal is merely whether there is a duty to warn of "known hazards" in situations where "the victim's condition or risk of injury is worsened by exposure to a separate toxic substance" — In other words, the normal, "concurring cause" situation, which, the plaintiffs' argue, does not merit review.

The third issue is whether the plaintiff's pretrial offer to settle their noneconomic damages claims was a valid offer of judgment under section 998 of the Code of Civil Procedure. The plaintiffs state that the actual issues are whether section 998 offers should be construed under the "standard rules for interpretation of contracts," and whether a pretrial offer covering two plaintiffs' claims is sufficient to trigger section 998 penalties. The issue identified in the petition, however,

was the dispositive issue in both the trial court's ruling, and was the only contested issue in the plaintiffs' cross-appeal. The question of whether section 998 recognizes partial settlement offers, therefore, is the third issue framed on appeal.

The record in the Court of Appeal and the Superior Court demonstrates that the issues identified in BP Chemicals' petition are the true issues framed on appeal, not the substitute issues preferred by the plaintiffs. The first and second issues present important questions of first impression in California, and should be reviewed to ensure that the law is justly and predictably applied in the growing number of aerospace-related asbestos products liability actions, as well as in other actions where the issues are relevant. The third issue also presents an important question, as the First District's opinion undermines the purpose of section 998 by authorizing its use to "bankroll" prolonged litigation.

II

DISCUSSION

A. BP Chemicals Presented the "Government Contractor Defense" Solely as a Defense to the Plaintiffs' Design Defect Claims

The plaintiffs state that the only issue on appeal involving the *Boyle* government contractor defense is whether the defense should have been applied to their failure-to-warn claims. (Answer, pp. 2, 6-10). The record, however, clearly shows that the plaintiffs are attempting to divert the Court's attention from the true issue framed in BP Chemicals' appeal, the application of the defense to their design defect claims.

In attempting this diversion, the plaintiffs ignore three indisputable matters of record: (1) that the judgment against BP Chemicals was based on the jury verdicts on

both the plaintiffs' design defect and failure-to-warn claims (Special Verdict Forms (Joint Appendix, Tab 8)); (2) that BP Chemicals appealed from the judgment with respect to the jury verdicts on both claims; and (3) that BP Chemicals' reliance on the government contractor defense, both at trial and on appeal, was expressly limited to the plaintiffs' design defect claims.

BP Chemicals simply never argued that the government contractor defense should be applied to the plaintiffs' failure-to-warn claims. Instead, the plaintiffs injected this uncontested issue into the proceedings. The application of the government contractor defense to failure-to-warn claims was not even properly before the court on BP Chemicals' appeal. *Marshall v. Bankers Life and Casualty Co.* (1992) 2 Cal.4th 1045, 1058, 10 Cal.Rptr.2d 72, *cert. denied,* U.S. , 121 L.Ed.2d 537. Contrary to the plaintiffs' contention, therefore, it was not the issue framed.

At trial, both parties moved for directed verdicts under the government contractor defense. (RT, 1658:14-1663:7). BP Chemicals' motion was directed solely against the plaintiffs' negligence and strict liability design defect claims. (RT, 1658:14-17; 1659:16-1660:10). The plaintiffs' motion was directed at ensuring that the defense would be stricken from both their design defect claims and their failure-to-warn claims. BP Chemicals openly admitted that it was not contending that the government contractor defense should be applied to the plaintiffs' failure-to-warn claims. (RT, 1658:18-22).

In disposing of the motions, the trial court addressed the application of the government contractor defense separately with respect to the design defect and failure-to-warn claims. With respect to the design defect claims, the trial court struck the defense based on a finding that U.S. Polymeric's asbestos-containing tapewrap was an "off-the-shelf," commercially marketed product akin to asbestos pipe

wrapping. (RT, 1660:25-28; 1661:7-17; 1662:25-1663:1). As for the failure-to-warn claims, the trial court based its ruling on BP Chemicals' admission that the military specifications for U.S. Polymeric's tapewrap, while prohibiting warnings from being printed on the product directly (RT, 1662:25-27), did not prohibit warnings on the packaging in which the tapewrap was shipped.

On appeal, BP Chemicals' only contention related to the government contractor defense was that the court erred in striking the defense with respect to the design defect claims. (Appellant's Brief, pp. 11, 15-30). BP Chemicals expressly disavowed the issue of whether the government contractor defense should have applied to the failure-to-warn claims. (Appellant's Reply, p. 25 n.10). In the response brief, moreover, the plaintiffs recognized that the trial court had separately considered the application of the government contractor defense to their design defect claims. (Respondents' Brief, pp. 17-26). The focus of the plaintiffs' lengthy argument therein was that U.S. Polymeric's tapewrap was not a "military" product, which was only relevant to the trial court's striking of the government contractor defense with respect to the design defect claims. (Respondents' Brief, pp. 22-26). Only a small portion of the response brief addressed whether the defense should be applied to failure-to-warn claims, which, as noted, was not even at issue. (*Id.*, pp. 26-28).

The First District's memorandum opinion demonstrates the Court of Appeal's awareness that the government contractor defense was at issue with respect to the design defect claims. (Mem. Op., p. 9). The First District, however, stated that "[w]e need not reach that issue," based on the view that the plaintiffs' judgment could be affirmed based on the jury's failure-to-warn verdict. (*Id.*, pp. 5-6, 9).

The first issue framed on appeal, therefore, is whether the government contractor defense is applicable to design

defect claims in products liability actions involving asbestos-containing products the U.S. government ordered for use in the construction of strategic guided missiles. As discussed in the petition, this issue is of first impression in California, and is of special importance given California's historically great involvement in government aerospace industries, and the consequent, burgeoning number of asbestos products liability actions involving aerospace workers. The Court should take this important issue under review.

B. The "Synergistic Effect" of Different Potentially Hazardous Exposures Is Distinct, as a Legal Cause of Injury, From Commonplace "Concurring Cause" Situations, and Involves a Distinct Duty to Warn

The plaintiffs represent the second issue on appeal as merely being whether, in toxic tort actions where "the victim's condition or risk of injury is worsened by exposure to a separate toxic substance," the exposure attributable to the defendant should be deemed as "a concurring cause of plaintiff's injury, even if not the sole cause," involving the ordinary duties of warning present in concurring cause situations. (Answer, pp. 11-12). BP Chemicals' petition, however, accurately frames the second issue as whether, consistent with the holdings of every located case, synergistic effects should, in appropriate cases, be recognized as legal causes of injury distinct from ordinary, concurring cause situations, involving distinct warning duties.

The plaintiffs challenge BP Chemicals' argument for review of the second issue on two independent grounds. First, the plaintiffs accuse BP Chemicals of mischaracterizing the issue. Second, the plaintiffs claim that BP Chemicals mischaracterized the cases cited in the petition as demonstrating that, in cases of causation by synergistic effect, the relevant duty to warn is of the risk of injury created by the synergistic effect, not the risk of any one of the involved

exposures considered independently. As with the first issue on appeal, only the plaintiffs are guilty of mischaracterization.

As with their first argument, the plaintiffs ignore much of the record in attempting to recast the second issue on appeal. According to the plaintiffs, BP Chemicals' argument that the jury attributed causation to the synergistic effect of smoking and asbestos exposure is based solely on the jury's finding that Gaylord was 10 percent contributorily negligent. (Answer, p. 10). As discussed in the petition and elsewhere, however, BP Chemicals' argument is founded both on the contributory negligence verdict, *and* on the special verdict that causation of Gaylord's cancer could not be apportioned between smoking and asbestos, based on the evidence presented by the plaintiffs that it was impossible to apportion causation because the cause of Gaylord's cancer was the synergistic effect. (Petition, p. 15; Petition for Rehearing, pp. 3, 6-11). BP Chemicals' statement of the issue, therefore, is accurate.

Prior to the Court of Appeals' issuance of the memorandum opinion, the plaintiffs were adamant that Mr. Gaylord's cancer was caused by the synergistic effect of smoking and asbestos, not by either exposure alone or by the two acting in simple combination. (Respondent's Brief, pp. 6-7 (citing consistent testimony of each plaintiff medical expert), 12 (admitting that "synergistic effect between smoking and asbestos exposure necessarily implicates smoking"). As evidenced by the consistent testimony of every one of the plaintiffs' experts, the plaintiffs' sole argument against apportioning causation was that the synergistic effect makes apportionment impossible precisely because such cases are distinct from ordinary, concurring cause situations. (*Id.*).

The plaintiffs' expert Dr. Barry Horn offered the following testimony on this issue:

> A. . . . The biology of this [synergistic effect] has not been clearly worked out. We don't understand the cellular mechanism of this, but there is no question that this occurs. That is, if you have been exposed to asbestos and you have smoked cigarettes, some interaction occurs between the two in the body and in the lung such that your risk for developing lung cancer, which was high from both, is greatly augmented such that your risk for developing lung cancer is very high.
>
> Q. Now, once you decide that there is a synergistic involvement of the two factors that an individual is exposed to, can you then kind of go backwards and try to figure out what the relative contribution was in causing the lung cancer between the asbestos and the smoking?
>
> A. There is no way to do that.
>
> Q. Why is that?
>
> A. Because the major risk has to do with some biological interaction that occurs between the two, and it's a function of both exposures. It's a function of both the asbestos exposure and it's a function of the cigarette smoking. It's the major risk that occurs in individuals who have both exposures has to do with this basic biological principal, some interaction occurs.

(RT, 284:8-285:1)

In response to a hypothetical question patterned after Mr. Gaylord's smoking and asbestos exposure, the plaintiffs' expert Dr. Allan Smith concurred that "smoking and asbestos probably contributed to causation" (RT, 512:14-15),

and that apportionment was impossible because the synergistic effect was the cause of lung cancer in such cases. (RT, 512:23-515:4). Dr. Smith testified about the apportionment problem as follows:

> Q. Is there any epidemiologic data that's been assembled to try to assess the validity of this kind of apportionment of risk [between smoking and asbestos]?
>
> A. Well, in terms of apportionment of risk you couldn't. This is a biological thing. If these agents are acting jointly in the body, you can't split this mathematical [*sic*] like that. There is no biological validity, whatsoever, nothing to support.

(RT, 519:12-18)

The plaintiff's expert Dr. Hammar offered similar testimony regarding the nonapportionability of causation in a synergistic effect case:

> Q. So, what happens in the case of somebody who had both occupational exposure to asbestos and a smoking history?
>
> 4. Well, if they had a significant smoking history and a significant history of exposure to asbestos, then what I usually say is that I think the cancer was caused by the combined effect. This has to do with the lung cancer . . . . [W]hat I would say, is that giving [*sic*] a person who has a moderate to high exposure to asbestos or a moderate to high concentration of asbestos in their lung tissue and who was a cigarette smoker, I would say that their cancer is caused by the combined effect of both agents. And I would not be able to apportion any part of that tumor to cigarette smoke versus asbestos.

(RT, 616:27-617:13).

Since the Court of Appeal affirmance, which was based on a view that the jury found asbestos alone to be the cause of Mr. Gaylord's cancer (Mem. Op., p. 6), the plaintiffs have reversed course entirely. The plaintiffs now disavow their argument that the synergistic effect of smoking and asbestos is distinct from ordinary concurrent causation, in order to avoid the fact that a distinct duty of warning applies in synergistic effect cases.[1] The court should recognize the plaintiffs' present attempt to disavow their sole causation theory as merely a diversion from the true issue on appeal — whether the failure-to-warn verdict is sustainable, given the undisputed fact that the synergistic effect of smoking and asbestos exposure was unknown until after U.S. Polymeric terminated its manufacture of asbestos-containing tapewrap. As discussed in the petition, BP Chemicals contends it is not.

The second prong of the plaintiff's attack accuses BP Chemicals of mischaracterizing the cases cited in the petition as demonstrating that the relevant duty to warn in synergistic effect cases is of the risk of injury caused by the synergistic effect, not the risk created solely by the exposure attributed to the defendant. The plaintiffs claim that "each of the cases cited by the defendant [involved] a product which was harmless or beneficial by itself, but which presented unusual hazards when used in combination with other products." (Answer Brief, p. 11). This is not true.

---

[1] In the alternative, the plaintiffs now maintain that the jury's contributory negligence finding does not indicate that Mr. Gaylord's smoking played any role in causing his cancer. (Answer, p. 12, n.5). This new position is insupportable, in view of the plaintiffs' acknowledgment that their experts "all took the position that cigarette smoking played a part in increasing Robert Gaylord's risk of cancer" (Respondents' Brief, p. 12), and their admission that "[t]he jury allocated 10 percent of the fault to plaintiff Robert Gaylord's comparative negligence in smoking." (*Id.*, p. 9).

The products involved in *Skill v. Martinez* (D.N.J. 1981) 91 F.R.D. 498 were oral contraceptives and cigarettes, each of which create a danger of strokes. Even the plaintiffs admit that the defendant's product (contraceptives) was not "harmless or beneficial by itself" but created a danger of strokes of which the manufacturer had warned. (Answer, p. 11). In *Barry v. Don Hall Laboratories* (Ore. App. 1982) 642 P.2d 685, involving sugar-coated vitamin C pills, the relevant duty to warn was of the greatly heightened risk of tooth decay caused by the synergistic effect of sugar and ascorbic acid, even though both substances, individually, are known causes of the same type of injury. In *Batteast v. Wyeth Laboratories, Inc.* (Ill. 1990) 560 N.E.2d 315, 321-22, cited by BP Chemicals but not discussed by the plaintiffs, the relevant duty to warn was of a synergistic effect that multiplied the toxicity of the prescription medications involved, even though each of the medications, independently, was toxic if overdosed.

Consequently, there is simply no support for the plaintiffs' declaration that "[i]n each case [cited by BP Chemicals] it was only the synergistic effect which presented the alleged defect." (Answer, p. 11). In reality, each of the cited cases stands for the proposition that a distinct duty to warn is involved in synergistic effect cases, even though the involved exposures, considered independently, create a risk of causing the plaintiff's type of injury. In synergistic effect cases, including the present matter, a warning of the risk of injury created by either of the involved exposures independently would be inadequate, as a matter of law, to satisfy the relevant warning requirement. *Skill v. Martinez, supra,* 91 F.R.D. at 513. As the law does not require futile acts, any failure of BP Chemicals to warn of known hazards of

asbestos exposure alone is irrelevant to failure-to-warn liability in this matter.[2]

The second issue on appeal, therefore, is whether the synergistic effect of different exposures, which increases the risk of injury many times over the risks presented by the individual exposures considered separately or in simple combination, should be recognized under California law as a distinct legal cause of injury, with a distinct duty of warning. As discussed, this issue has been resolved consistently with BP Chemicals' position in every located case from other jurisdictions. The issue is of particular importance in the context of asbestos products liability actions, where strict liability is often imposed on the asbestos industry for smokers' injuries, provided only that some occupational history of asbestos exposure can be reasonably alleged, and is relevant to other cases involving synergistic effects. The Court, therefore, should grant review to this important issue.

C. An Offer to Compromise Only a Portion of the Plaintiff's Claim Against the Involved Defendant Is Not a Valid Offer of Judgment Under Section 998

The plaintiffs devote a full third of their answer brief to responding to BP Chemicals' single-page argument that section 998 penalties should not be invoked when the pretrial "offer of judgment," if accepted, would not have

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[2] The plaintiffs also attempt to denigrate BP Chemicals' argument by stating that "if defendant had adequately warned of asbestos exposure by itself, the arguments it has raised on appeal might have some merit." (Answer, p. 11). This attempt to portray BP Chemicals in a negative light is entirely unavailing. The plaintiffs have apparently forgot that their case against BP Chemicals was founded in strict liability, under a rule imposing the highest standard of expert knowledge on defendants who, even though justifiably, may lack expert knowledge. As the plaintiffs admit, U.S. Polymeric began providing asbestos health warnings at the same time as asbestos manufacturers generally. (Answer, p. 4).

terminated the plaintiffs' action against the offeree defendant. (Answer, pp. 12-16). The plaintiffs contend that BP Chemicals has misstated the issue on appeal, which, they claim is whether section 998 offers "should be interpreted according to the standard rules for interpretation of contracts" and whether "an offer under 998 which covers claims of two plaintiffs is sufficient to trigger liability for extra costs if it is less than the recovery of the plaintiff whose recovery was the smaller of the two." (Answer, p. 2).

Once again, it is the plaintiffs who have mischaracterized the issue. Although the plaintiffs' briefs in support of their cross-appeal presented the foregoing arguments in detail, BP Chemicals' opposition was based solely on the invalidity of the plaintiffs' section 998 offer, which, if accepted, would not have resulted in a judgment terminating the action against it. (Appellant's Reply, pp. 28-29). As discussed in the petition, had BP Chemicals accepted the offer, the plaintiffs' economic damages claims would have remained for trial. The issue identified by BP Chemicals was the issue the Superior Court found dispositive in denying the plaintiffs' motion for section 998 costs. The Court of Appeal recognized the validity of the court's ruling in this regard (Mem. Op., pp. 12-13), yet erroneously reversed the Superior Court's denial of the plaintiffs' costs motion. (*Id.*, p. 14). While the plaintiffs raised other issues, they were never disputed by BP Chemicals. The petition, therefore, accurately identifies the third issue on appeal.

III

CONCLUSION

As shown, rather than attempting to minimize the important need for review of the unresolved legal issues presented in the petition, the plaintiffs argue that these are not the issues framed on appeal. As demonstrated, BP Chemicals' petition accurately identifies these issues.

The plaintiffs' answer, therefore, merely demonstrates the lack of any credible opposition to review. The Court, therefore, should grant review of the important legal issues raised in the petition.

DATED: September 8, 1994

KENNEY, BURD & MARKOWITZ

By: /s/ TOM K. HAMMITT

STEPHEN C. KENNEY
TOM K. HAMMITT
Attorneys for Defendants, Appellant, Cross-Respondent
BP CHEMICALS (HITCO) INC.

PROOF OF SERVICE

I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is Two Embarcadero Center, Suite 740, San Francisco, California 94111.

On September 8, 1994, following ordinary business practices, I placed for collection and mailing at the offices of Kenney, Burd & Markowitz, located at Two Embarcadero Center, Suite 740, San Francisco, California 94111, a copy of the attached "Reply to Opposition to Petition for Review" in a sealed envelope with postage thereon fully prepaid, addressed as follows:

Original +14 copies delivered via Federal Express to:

Supreme Court of California
303 Second Street, South Tower, Room 8023
San Francisco, CA 94107

One copy mailed to:

Clerk of the Court of Appeal
303 Second Street, South Tower, 6th floor
San Francisco, CA 94107

One copy mailed to trial judge:

The Honorable Laurence Kay
Superior Court of California
County of San Francisco
400 Van Ness Avenue
San Francisco, CA 94102

One copy delivered via first class mail to opposing counsel:

Bryce Anderson, Esq.
Law Offices of Bryce C. Anderson
1985 Bonifacio Street, Suite 102
Concord, CA 94520

I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 8, 1994, at San Francisco, California.

/s/ SHARON PROSSER

Sharon Prosser

APPENDIX 27

First Appellate District, Division Four, No. A059183
S041709

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

IN BANK

ROBERT GAYLORD Et. Al.,

Respondents,

v.

B.P. CHEMICALS (HITCO) INC.,

Appellant

Appellant's petition for review DENIED.

By: /s/ LUCAS
Chief Justice

(3)

Supreme Court, U.S.
FILED
FEB 10 1995
OFFICE OF THE CLERK

No. 94-1220

In the

Supreme Court of the United States

OCTOBER TERM, 1995

BP CHEMICALS (HITCO) INC.,
Petitioner,
v.
ROBERT and JANET GAYLORD,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal for the State of California, First Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

Bryce C. Anderson
Attorney at Law
1985 Bonifacio Street
Suite 102
Concord, CA 94520
(510) 686-2300
Counsel of Record
Philip A. Harley

Brayton, Gisvold & Harley
999 Grant Avenue
P.O. Box 2109
Novato, CA 94948
(415) 898-1555
Counsel for Respondents
Robert and Janet Gaylord

ZAP Printing, Inc., 1880 Colfax Street, Concord, California 94520 (510) 827-2500

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QUESTIONS PRESENTED

The question presented by petitioner was not an issue at trial or on appeal. Respondents conceded that the military contractor defense applies to products liability cases tried under a "failure to warn" theory as well as those tried under a "design defect" theory. [See Appendix 18, p. 29.] The central legal issue on appeal involving the military contractor defense was whether or not a defendant such as BP Chemicals (HITCO) Inc. could assert the military contractor defense without showing that the particular alleged defect, in this case the absence of warnings or appropriate safety instructions on the use of asbestos materials, was addressed in a military specification.

A second question which was raised by respondents below but which was not necessary to the state court decision is whether or not a subcontractor such as BP Chemicals (HITCO) Inc. which does not itself have a contract with the military may raise the military contractor defense against a suit by an employee of the military contractor injured by a defect in a component material supplied by the subcontractor.

A third question which was raised by respondents below but which was not necessary to the decision of the state court is whether or not a supplier such as BP Chemicals (HITCO) Inc. which supplies a product to a military contractor may assert the military contractor defense when this same supplier has sold the same product on the open market to private individuals.

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STATEMENT OF THE CASE

A. Robert Gaylord's background and work history.

Robert Gaylord, who was 59 years old at the time of trial, worked as a machinist at Kaiser Aerospace in San Leandro, California. [Respondent's Brief ("RB") 3, reproduced at Appendix 18.] He joined Kaiser Aerospace in 1956 as a journeyman machinist running the lathes, mills, drills and surface grinder. [Id.] In 1958 he was transferred to the tracer lathe section where he worked from 12 to 14 hours a day, six or seven days a week. [Id.] Kaiser was making missiles at the time, and there were about 50 tracer lathes working in the section, each one about five to 12 feet from the next. [Id.]

Gaylord's job involved finishing the nose cones of missiles with a lathe. [RB 3.] The nose cones were made of plastic impregnated with asbestos, and the lathe processing would release the asbestos fibers into the air. [RB 4.] Gaylord worked on thousands of missile nose cones at Kaiser from the 1950's to the 1980's and when he worked at the tracer lathe, the process would generate a great deal of dust. [Id.]

Johann Roehl, a Kaiser Aerotech employee who worked with Gaylord, testified that on a normal day at Kaiser in the 1960's most of the machines were operating; the plant was operating four shifts with 35 people on the lathes. [RB 4.] Conditions were very dusty, and even when the vacuum was installed, the dust sometimes blew from the vacuum back into the work area. [Id.] Roehl testified that when Gaylord worked as "lead man" and then supervisor, he still worked on the floor of the plant and not in an office. [Id.]

In the spring of 1987 Gaylord consulted several doctors because of persistent colds. [RB 4.] He was eventually diagnosed with terminal lung cancer [Id.]

B. Trial.

As is typical of asbestos-related personal injury litigation in California, this case was bifurcated. [RB 5.] The first phase of the trial concerned the issue of whether Robert Gaylord suffered an asbestos-related disease and, if so, the amount of damage he and his wife had suffered. [RB 6.] The second phase concerned whether or not defendant's product was a contributing cause to that disease. [RB 8.]

Kenneth Cohen, an industrial hygienist, testified that although asbestos fibers are normally too small to be seen, they can become visible at extremely high concentrations. [RB 6.] When a worker such as Robert Gaylord describes a workplace as having a "sustained fog" in the air, he is being exposed to asbestos fibers in a concentration of 60 to 100 fibers per cubic centimeter. [Id.] Although asbestos is usually mixed with other materials in commercial applications, the asbestos fibers typically stay suspended in the air longer than the materials it is mixed with. [Id.]

Kenneth Cohen described how Robert Gaylord's job of finishing the nose cones of missiles with a lathe involved direct exposure to asbestos. [RB 6.] He noted that although the asbestos particles were originally encapsulated, the lathe process broke apart the plastic, releasing fibers. [Id.] Gaylord's exposure was comparable to an asbestos textile worker, an insulator or one overhauling a ship. [Id.]

Dr. Barry Horn, a lung specialist, testified that there is a dose-response relationship between asbestos exposure and lung diseases, and that all of Robert Gaylord's asbestos exposure up to mid-1977 should be considered a contributing factor of his malignancy. [RB 6 to 7.] Dr. Allan Smith, an epidemiologist, testified regarding the evidence linking occupational exposure to asbestos with the development of lung cancer. [RB 7.] Dr. Samuel Hammar, a pathologist, testified that Robert Gaylord's lung tissue contained both squamous cell carcinoma and a great deal of asbestos-related interstitial fibrosis. [Id.] He further testified that the amount of asbestos exposure incurred by Gaylord could itself cause lung cancer regardless of cigarette smoking. [Id.]

After the jury returned a verdict in the first phase finding that Robert Gaylord's cancer was asbestos-related, Gaylord testified in the second phase that he worked on the Advanced Minuteman missile from the middle of the 1960's into the 1980's. [RB 8.] He testified that various missiles were built using the "asbestos overwrap" system, and that in particular he machined about 80% to 90% of the minuteman missiles using the asbestos overwrap method. [Id.]

Bill Vida, who began with Kaiser Aerotech in 1955 as a machinist and then worked in production control from 1961 until he retired in 1991, was responsible for ordering materials for the plant. [RB 8.] He ordered various products from U.S. Polymeric (the predecessor to BP Chemicals) including silicate materials and asbestos bypass tape, also known as ablative tape or "overwrap." [Id.] When these products were received they would be put in storage in their containers and later taken to the plastics department for wrapping. [Id.]

The inspection department looked at the material from U.S. Polymeric when it arrived to verify the quantities. [RB 9.] It then went through the plastic operation and was machined in a raw state by the machinists, who then cured the overwrap in its final configuration. [Id.]

The asbestos tapes manufactured by U.S. Polymeric had been sold to commercial sources long before it was used by Kaiser in its missile cones. [RB 28.] The ablative materials from U.S. Polymeric were, however, used on many missile programs including the Poseidon, the Trident, the Advanced Minuteman, the SRAM nozzle and the SRM-I AND SRM-II. [RB 9.] Kaiser ordered materials on a monthly basis, and in the mid to late 1960's and into the 1970's there were thousands of pounds of the materials coming into the plant, mostly from U.S. Polymeric. [Id.]

Vida had no knowledge of the dangers of asbestos in the 1960's and did not know that the materials from U.S. Polymeric contained asbestos. [RB 9.] He never saw any warnings on the packages from U.S. Poly about the dangers of asbestos to workers. [Id.] There was no secrecy requirements regarding the contents of the materials being ordered, however, and no conflict in production requirements that would have prevented U.S. Polymeric from issuing warnings about the contents of the products that contained asbestos. [Id.]

On the basis of the undisputed evidence presented, the trial court found that the U.S. Polymeric asbestos tape was not military equipment because it had been sold to commercial sources long before it was used in the Kaiser missile programs. Following the presentation of evidence

and argument he case then went to the jury on independent product liability theories of design defect and failure to warn. The jury found that plaintiff had been exposed to defendant's products, that these products were defective and that defendant had failed to warn of the dangers involved in the use of its products. [RB 10.]

Defendant appealed to the California Court of Appeal, raising issues of the sufficiency of the evidence as well as errors in bifurcating the trial between liability and damages and striking the military contractor defense on the design defect issue. [See RB 10 to 11.] Defendant asserted, among other things, that the court should have looked at the entire missile manufactured by Kaiser as the relevant military product, rather than at the asbestos tape supplied by defendant. [See AB 20.] Although the jury had returned a verdict which was independently supported by a failure to warn theory, defendant did not contend that military specifications precluded the giving of warnings to plaintiff and the other Kaiser workers regarding the hazards of asbestos exposure. [See AB 29 to 37.]

The Court of Appeal affirmed the judgment against defendant on the basis that there was no showing whatsoever that military specifications precluded the giving of warnings regarding the hazards of asbestos exposure. [Appendix 20.] Defendant sidestepped this issue on its petitions for rehearing in the Court of Appeal [Appendix 21] and its petition for review in the California Supreme Court [Appendix 24]. Both petitions were denied without comment.

REASONS FOR DENYING THE PETITION

I. THE ISSUE RAISED BY PETITIONER WAS NOT IN DISPUTE IN THE CALIFORNIA COURTS

Petitioner BP Chemicals (HITCO), Inc. asserts that there is an unsettled issue in federal and state courts as to whether the military contractor defense as set forth in *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500 [101 L.Ed.2d 442, 108 S.Ct.2510] applies to claims denominated under state law as "failure to warn" claims, as well as to those described as "design defect" claims. Whether or not this issue is unsettled, it is not presented by this case. Petitioner specifically waived this issue in its efforts to seek review before the California Supreme Court, even though respondent had on appeal expressly conceded that the military contractor defense applies to "failure to warn" claims. Moreover, published California decisions clearly hold that the military contractor defense applies to state law tort claims based upon a failure to warn of product hazards.

A. Petitioners expressly waived below the issue which they seek to assert here.

The jury in this case decided for plaintiffs on independent theories of design defect and failure to warn. [See Appendix 9, "Special Verdict Phase II" Question 1.] Throughout the appellate proceedings below, respondents Robert and Janet Gaylord argued that the verdict in their favor could be sustained on the independent ground that BP Chemicals failed to provide adequate warnings and instructions with their asbestos products, and that there were no military specifications preventing such warnings and instructions. [See Appendix 18, pp. 29-31; Appendix

22, pp. 3-5; Appendix 25, pp. 7-12.] The Court of Appeal upheld the verdict on precisely this basis. [See Appendix 20, pp. 3-9.]

Despite these contentions of respondents and the ruling of the Court of Appeal, BP Chemicals made the following statement in its reply in support of its petition for review in the California Supreme Court:

> "BP Chemicals simply never argued that the government contractor defense should be applied to the plaintiffs' failure-to-warn claims. Instead, the plaintiffs injected this uncontested issue into the proceedings. the application of the government contractor defense to failure-to-warn claims was not even properly before the court on BP Chemicals' appeal. [Citation omitted.] Contrary to plaintiffs' contention, therefore, it was not the issue framed."

[Appendix 26, p. 4.] This concession by BP Chemicals demonstrates that the issue which it seeks to raise before this Court was not presented squarely by BP Chemicals to the California Supreme Court, and in fact was expressly waived by BP Chemicals. Having failed to preserve this issue below, BP Chemicals is not entitled to have this Court grant certiorari on this issue now. See generally *Board of Directors of Rotary Intern. v. Rotary Club of Duarte* (1987) 481 U.S. 537 [95 L.Ed.2d 474, 107 S.Ct. 1940].

B. Respondents never contested the applicability of the military contractor defense to claims based on failure to warn.

At the time that the case of *Gaylord v. BP Chemicals (HITCO) Inc.* was being tried in the Superior Court of the City and County of San Francisco, California law was clear that tort claims based upon failure to provide adequate warnings and instructions regarding the use of a product were a variant of product liability claims. See generally *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987 [281 Cal.Rptr. 528, 810 P.2d 549]. On appeal from the judgment respondents conceded that the military contractor defense as set forth in *Boyle v. United Technologies Corp., supra,* 487 U.S. 500 applied to product liability claims based on both "design defect" and "failure to warn" theories. [Appendix 18, pp. 28-30.] Respondents contended successfully, however, that BP Chemicals had never established that there were any military specifications regulating the giving of warnings regarding the hazards of asbestos products. [Id.]

The California Court of Appeal affirmed the trial court's ruling on the military contractor defense on precisely the ground asserted by respondent, expressly recognizing the applicability of the *Boyle* decision to this area of law. [Appendix 20, pp. 7-9.] Contrary to BP Chemicals' assertions, neither the trial court nor the appellate court ruled that the military contractor defense was inapplicable to failure to warn claims. Petitioner BP Chemicals has thus failed to show that there is any federal question which needs to be resolved in this case, and for this additional reason certiorari should be denied.

C. California case law recognizes the applicability of the military contractor defense to failure to warn claims.

As a reason for granting certiorari, petitioner points to the supposedly "unsettled" nature of the law regarding the applicability of the military contractor defense as set out in *Boyle* to claims based on failure to warn. It is a moot point whether any such conflict exists, because California law is clear that the defense applies equally to both design defect and failure to warn claims.

Federal and state decisions in California recognized the military contractor defense in virtually its present form long before this Court decided *Boyle*. See generally *McKay v. Rockwell International Corp.* (9th Cir. 1983) 704 F.2d 444 and *McLaughlin v. Sikorsky Aircraft Co.* (1983) 148 Cal.App.3d 203 [195 Cal.Rptr. 764]. As one federal court noted, this Court's decision in *Boyle* changed only the ideological basis for the defense as set out in *McKay*, and not its substantive elements. See *McGonigal v. Gearhart Industries, Inc.* (5th Cir. 1988) 851 F.2d 774 at 777.

Following the decision in *Boyle* the California Court of Appeal decided a case which squarely recognized the applicability of the military contractor defense to claims based on failure to warn of product hazards. See *Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1315 [273 Cal.Rptr. 214]. Accordingly, if there is a split of authority among federal and state courts on this issue, California courts are among those applying *Boyle* to failure to warn cases. The petition therefore presents no controversy warranting review by this Court.

II. COURTS ARE NOT SPLIT REGARDING THE APPLICABILITY OF BOYLE TO FAILURE-TO-WARN CLAIMS

Petitioner BP Chemicals seeks certiorari based upon the contention that there is a split among federal and state courts regarding the applicability of the military contractor defense as set forth in *Boyle* to product liability claims based upon a failure to warn of product hazards. If there is such a split, it is not evident from the cases cited by petitioner. Leaving aside any cases which may have been decided before this court's decision in *Boyle*, the cases cited by petitioner demonstrate only that in some situations a defendant cannot establish the elements of the military contractor defense.

As petitioner correctly points out, cases such as *Niemann v. McDonnell Douglas Corp.* (S.D. Ill. 1989) 721 F.Supp. 1019 have generally held that the military contractor defense is, on the proper factual showing, applicable to claims based upon both product defect and failure to warn. *Niemann*, however, was a products liability based on design defect; the "failure to warn" aspect of the case was the failure to warn *the government* about the hazards of asbestos. *Id.* at 1024-1025. A case more in point is *Nicholson v. United Technologies Corp.* (D.Conn. 1988) 697 F.Sup. 598 in which a failure to warn case based on the absence of a warning in an aircraft maintenance manual was decided directly under the military contractor defense on the ground that the military specifications controlled the content of the manual. *Id.* at 602-605. The point of interest in *Nicholson* was that this issue was decided by examining the military specifications dealing specifically with the contents of the manual, and not on the specifications dealing with the aircraft

generally. See also *Ramey v. Martin-Baker Aircraft Co.* (D. Md. 1987) 656 F.Supp. 984, aff'd 874 F.2d 946 (4th Cir. 1989), cited by petitioner, in which the district court granted summary judgment to defendants on plaintiffs' design defect claims, holding that these claims were barred by the military contractor defense, but denied summary judgment on the failure to warn claims.

The cases cited by petitioner for the opposite viewpoint, i.e. that the military contractor defense does not apply to failure to warn claims, contain no such holding. In each case the court decided whether or not, on the facts presented, there was any conflict between the federal military specifications and the state law duty to warn. In *Joint E. & S. Dist. New York Asbestos Litigation (Grispo v. Eagle-Picher Industries, Inc.)* (2d Cir. 1990) 897 F.2d 626, the Second Circuit Court of Appeals specifically recognized the application of the military contractor defense to failure to warn claims, reversing a summary judgment for plaintiffs on this defense because there was an issue of fact as to whether Navy packaging specifications precluded Eagle-Picher from including product warnings with its asbestos goods. *Id.* at 637; see also *Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305 [273 Cal.Rptr. 214] reversing summary judgment for defendant paint manufacturers on the ground that there was a triable issue as to whether military specifications precluded further warnings. In *Hawaii Federal Abestos Cases* (9th Cir. 1992) 960 F.2d 806 the Ninth Circuit affirmed judgments on jury verdicts, holding that the evidence showed that (1) the defendants' asbestos products were not "military equipment," and (2) independent of the military equipment issue, there was no Navy contract specification preventing warnings from being placed on asbestos products. *Id.* at 812-814; see

also *Dorsé v. Eagle-Picher Industries, Inc.* (11th Cir. 1990) 898 F.2d 1487, upholding a verdict on the ground that defendants failed to show any military specification precluding warnings. None of these cases held that the military contractor defense is per se inapplicable to failure to warn claims; in each case, the court examined the specific issue of whether and to what extent the military specification governing defendant's product covered the area of warnings.

This Court decided in *Boyle v. United Technologies Corp., supra,* 487 U.S. 500, that it would not pre-empt the entire body of state law in the field of tort litigation where military products were concerned, but would instead allow the military contractor defense only in cases in which the state law duty of care conflicted with the duties of the defendant under the particular military contract in question. *Id.* at 507 to 512. In affirming the judgment in *Boyle* on the basis of the military contractor defense, this Court specifically noted that the plaintiffs were claiming a design defect, namely an outward-opening escape hatch rather than an inward-opening one, which was precisely the design required under the military specifications. *Id.* at 509. The lower federal and state courts have followed this Court's decision faithfully. In each case the courts have examined the particular product in light of the defect claimed by plaintiffs and the requirements of the military contract governing that product to determine whether the military design specifications. Although the various federal and state courts have reached different results on different facts with different products, the rule of law applied by each of these courts has been consistent with this Court's holding in *Boyle*.

III. EXISTING LAW ADEQUATELY COVERS THE OF MILITARY CONTRACTORS' TORT LIABILITY

Defendant BP Chemicals asserts that this Court should adopt a uniform rule of law to determine whether claims for design defects include claims based on theories of failure to warn of product hazards for the purposes of the military contractor defense. As can be seen from the preceding section, the law in this area is already uniform. Claims of failure to warn are within the scope of design defects for purposes of the military contractor defense, but the proof of that defense requires a showing that the defect in question, i.e. the failure to warn of a product hazard, was covered by the military specification at issue. BP Chemicals made no showing whatsoever that its predecessor was precluded by military contract requirements from warning about the hazards of asbestos exposure, and thus there was no conflict between the requirements of state law and those of any military contracts.

Petitioner's contention that tort claims in this area are thwarting federal policy is specious. Initially it should be noted that the Gaylords were suing BP Chemicals, the manufacturer of asbestos tape, and not Kaiser, the government contractor and manufacturer of the missiles which used the asbestos tape. Kaiser, of course, was Gaylord's employer and immune under California law from lawsuits by employees except under extremely limited circumstances. See generally, *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465 [165 Cal.Rptr. 858, 612 P.2d 948]. More in point, however, there was no evidence that the asbestos tape posed any particular health hazard once it was incorporated into the missile; the hazard came in using the tape in the process

of manufacturing the missile. Moreover, this hazard was one which was suffered by the very defense workers building the missiles which were necessary to the defense effort. Thus, unlike the situation in *Niemann v. McDonnell Douglas Corp., supra,* 721 F.Supp. 1019, plaintiffs were not contending that the end military product was defective; they were contending that an independently manufactured component which was sold to the military contractor was defective.

The second point to note is that the assertions by BP Chemicals that the hazards of asbestos exposure were not known by manufacturers until the mid-1970's [see Petition, p. 3, 17] borders on the ludicrous. U.S. Polymeric, the predecessor of BP Chemicals, was in the business of manufacturing asbestos tape, and was therefore charged with the knowledge that was readily available to asbestos manufacturers regarding the hazards presented by the use of these products. In *Borel v. Fiberboard Paper Products Corp.* (5th Cir. 1973) 403 F.2d 1076, the Fifth Circuit commented on the state of the knowledge of the asbestos industry on this point as follows:

> The unpalatable facts are that in the twenties and thirties the hazards of working with asbestos were recognized; that the United States Public Health Service documented the significant risk in asbestos textile factories in 1938; that the Fleischer-Drinker report was published in 1945; that in 1961 Dr. Irving Selikoff and his colleagues confirmed the deadly relationship between insulation work and asbestos. . . . During his working years [plaintiff] received no warnings of any kind from three of the six defendants. The other three defendants issued no warnings until 1964-66, by which time adequate warnings would have come too late . . . [*Id.* at 1106.]

Contrary to BP Chemicals' bland assertion [Petition, p. 17], the use of asbestos tape was not "cutting-edge" high technology in the 1960's and 1970's. This was an ordinary product which had inherent hazards well known to the industry but, unfortunately, unknown to the defense workers who used these products.

This Court conducted a careful weighing of public policy in its decision in *Boyle*. Recognizing the military's need to make hard choices between safety and efficiency in the context of military equipment, this Court immunized military contractors from injury claims resulting from these hard choices. At the same time, this Court did not allow contractors to escape all liability whatsoever merely because their products were sold to the military. The parameters of the military contractor defense laid down by this Court in *Boyle* extended only as far as the public policy behind it, and did not insulate contractors from liability for safety hazards which were not part of the military specifications.

BP Chemicals' unstated intent is not to have this Court review some hypothetical difference of opinion among the federal and state courts. Rather, it seeks to have this Court revisit *Boyle* and to preclude any tort litigation of any kind over any aspect of a product or its components once it is determined that the product was purchased by the military and covered by military specifications of any kind. This rule would give every manufacturer of any product connected with the defense industry carte blanche to inflict unnecessary hazards on military and civilian personnel alike, all in the name of efficiency. The public policy factors behind the military contractor defense do not require this Court to revisit *Boyle* as petitioner would wish.

IV. PETITIONER'S CONTENTIONS REGARDING DESIGN DEFECT THEORIES WOULD NOT CHANGE THE OUTCOME OF THIS CASE

Petitioner BP Chemicals has briefed several issues regarding the applicability of the military contractor defense to the area of design defect, even though these issues were not set forth in its "Question Presented" or decided by the California Court of Appeal. Contrary to petitioner's assertions, it was not automatically entitled to a defense verdict even if the case had been reviewed on design defect issues. Moreover, petitioner does not explain how the outcome of this case would have been different if its design defect theories had been reviewed.

A. Petitioner was not a military contractor and its products were not military equipment.

Petitioner's contention that it may hide its component product under the shield of the end military product is also specious. As noted previously, this is not a case like *Niemann v. McDonnell Douglas Corp., supra,* 721 F.Supp. 1019 in which the plaintiffs, the ultimate product users, were suing the manufacturer of the end product (in that case a military jet) because of the hazards presented by one of its components . In this case, the defendant is the component manufacturer whose product was hazardous when used in the manufacturing of the military equipment, but which was not hazardous after that manufacturing was complete. Respondents would submit that in these circumstances petitioner's product must stand or fall on its own.

There was no evidence the U.S. Polymeric had any contract with the military; it was merely a supplier of

asbestos tape to Kaiser, which was a military contractor. Moreover, contrary to petitioner's assertion, there was evidence that U.S. Polymeric had made substantial sales of asbestos tape to commercial sources long before it sold this tape to Kaiser for missile cones. [Appendix 18, RB 28.] Although some courts have held that the military contractor defense applies to design defect claims in this context, see *Brooklyn Navy Yard Asbestos Litigation* (2d Cir. 1992) 971 F.2d 831, 839-840, plaintiffs would submit that the rationale for the defense, i.e. the increased cost to the military due to the need for the contractor to purchase product liability insurance, see *Boyle, supra,* 487 U.S. at 511-512, would be inapplicable in this case because the contractor would need product liability insurance whether or not he sold to the military.

B. Petitioner was held liable on an independent theory of failure to warn.

Whether or not petitioner is correct that the trial court erred in excluding the military contractor defense as to the design defect theories, the fact remains that the jury independently determined that petitioner failed to warn its customers of a deadly hazard associated with the ordinary and routine use of its products. This independent theory resulted in an award of damages which would not have changed even if the design defect claim had been stricken. [See Appendix 9.]

Every court that has directly considered this issue since the *Boyle* decision has treated the theory of failure to warn as a separate and independent basis of liability which must be separately analyzed for the purposes of the military contractor defense. See, e.g., *Brooklyn Navy Yard Asbestos Litigation, supra,* 971 F.2d 831, 839-840; *Joint E.*

& S. Dist. New York Asbestos Litigation (Grispo v. Eagle-Picher Industries, Inc.), supra, 897 F.2d 626, 630-632; *Hawaii Federal Abestos Cases, supra,* 960 F.2d 806, 812-813; *Jackson v. Deft, Inc., supra,* 223 Cal.App.3d 1305, 1317-1318. The judgment, which was affirmed on the basis of the independent theory of failure to warn, would not be affected by a determination that the trial court committed an error in relation to another independent theory.

CONCLUSION

Petitioner BP Chemicals, Inc. has asserted that the judgment in this case should be reversed because of the trial court's error in applying the military contractor defense to respondents' design defect claims. That issue, however, was not the basis for the decision by the California Court of Appeals. At the same time, the only issue presented for review by petitioner in its "Questions Presented" section was expressly waived by petitioner in its briefing before the California Supreme Court.

Even absent this issue of waiver, petitioner has shown no error regarding the state court treatment of the military contractor defense as applied to claims based on a failure to warn. Both federal and state courts have been consistent in their application of this Court's *Boyle* decision to those claims, and on the undisputed evidence petitioner failed to establish a triable issue of fact regarding the application of the military contractor defense to respondents' claims on this theory. Accordingly, no basis for review has been shown.

For the foregoing reasons, respondents Robert and Janet Gaylord respectfully submit that the petition for

certiorari should be summarily denied.

Dated: February 9, 1995 Respectfully submitted,

Bryce C. Anderson
Attorney at Law
1985 Bonifacio Street
Suite 102
Concord, CA 94520
(510) 686-2300
Counsel of Record
Philip A. Harley

Brayton, Gisvold & Harley
999 Grant Avenue
P.O. Box 2109
Novato, CA 94948
(415) 898-1555
Counsel for Respondents
Robert and Janet Gaylord